Supreme Court, U.S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

343

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR, and ARAMIS GOMEZ*,

Petitioners,

against

PEDRO ESCALERA and ROSE ESCALERA,

Respondents.

(*Continued on back*)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

ROSE LEE ROLLE,

Respondent.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

WALTER LOCKMAN and VIOLA LOCKMAN,

Respondents.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD,

Respondents.

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* The above-named officials now hold the positions as the members of the New York City Housing Authority, and supersede the officials originally named as defendants in the proceedings below, i.e., Francis V. Madigan and Albert A. Walsh. Rule 48(3), Rules

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Appendix A, Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 441-444—September Term, 1969.
(Argued January 14, 1970 Decided April 29, 1970.)
Docket Nos. 33226-33229

PEDRO ESCALERA and ROSE ESCALERA, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, individually and as a Member of the New York City Housing Authority, SIMEON GOLAR, individually and as a Member of the New York City Housing Authority, and ALBERT A. WALSH, individually and as a Member and Chairman of the New York City Housing Authority,

Defendants-Appellees.

ROSE LEE ROLLE, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

v.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, individually and as a Member of the New York City Housing Authority, SIMEON GOLAR, individually and as a Member of the New York City Housing Authority, and ALBERT A. WALSH, individually and as a Member and Chairman of the New York City Housing Authority,

Defendants-Appellees.

WALTER LOCKMAN and VIOLA LOCKMAN, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK CITY HOUSING AUTHORITY and WILLIAM WALSH, IRA S. ROBBINS and SIMEON GOLAR, individually and in their capacities as a member of the New York City Housing Authority,

Defendants-Appellees.

CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, individually and in his capacity as a member of the New York City Housing Authority, and FRANCIS V. MADIGAN, individually and in his capacity as a member of the New York City Housing Authority,

Defendants-Appellees.

Before:

MEDINA, WATERMAN and SMITH,

Circuit Judges.

Appeals from dismissal on motion in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, of four actions by tenants against the New York City Housing Authority seeking injunctive

and declaratory relief and in two cases money damages for violations of tenants' rights to due process in eviction and penalty proceedings by the Housing Authority. Reversed and remanded.

NANCY E. LEBLANC, New York, N. Y. (MFY Legal Services, Inc., New York, N. Y., Harold J. Rothwax and Michael B. Rosen, of counsel), *for Plaintiffs-Appellants Escalera and Rolle.*

HENRY A. FREEDMAN, New York, N. Y. (Center on Social Welfare Policy & Law, New York, N. Y., Lee A. Albert and Harold Edgar, New York, N. Y.); Richard Kwasnik and Harold Washington (Morrisania Legal Services, Bronx, N. Y., of counsel), *for Plaintiffs-Appellants Lockman & Humphrey.*

HAROLD WEINTRAUB, New York, N. Y. (Harold Levy and Jeanne Dorfman, New York, N. Y., of counsel), *for Defendants-Appellees.*

SMITH, *Circuit Judge*:

Appellants are tenants in New York City public housing projects. They brought four suits in the United States District Court for the Southern District of New York against the New York City Housing Authority [hereinafter cited as "HA"] and certain individuals as officers of the HA, in the form of class actions on behalf of themselves and all tenants similarly situated. The complaints invoked jurisdiction under the Civil Rights Act, 28 U.S.C. §1343(3) (1962), and alleged the deprivation of appellants' right

to due process secured by the Fourteenth Amendment to the Constitution and of their rights under the United States Housing Act of 1937, 42 U.S.C. §1401 et seq. (1962). They sought injunctive and declaratory relief against certain alleged practices of the HA, 28 U.S.C. §§2201, 2202 (1962), 42 U.S.C. §1983 (1970), and in two instances (Haywood and Lockman) a money judgment for additional rents which had been paid.

Appellants sought a preliminary injunction by filing an order to show cause. Defendant then moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the actions for, *inter alia*, failure to state a claim upon which relief could be granted, lack of jurisdiction, lack of substantial federal question, and failure to exhaust administrative remedies, and because the federal courts should abstain from considering these actions pending a determination by New York state courts in the first instance.

After the parties submitted affidavits, argument on the motions was heard before District Judge Sylvester J. Ryan. Thereafter by an opinion of October 31, 1968 (67 Civ. 4236, 4306, 4307, 4414 S.D.N.Y.), and judgment of the next day, Judge Ryan granted defendants' motion, and dismissed the actions on the merits. We find error in the dismissal of these actions and remand to the district court to consider appellants' application for preliminary relief and to hold a trial on the merits.

The instant class actions challenge the constitutionality of the procedures used by the HA in three different types of actions: (1) termination of tenancy on the ground of non-desirability; (2) termination of tenancy for violation of HA rules and regulations; and (3) assessment of "additional rent" charges under the HA lease for undesirable acts by tenants. The HA, a corporate governmental agency financed by federal, state and city funds, administers the largest public housing program in the country, housing more than 144,000 families.

I.

Since the complaints were dismissed at the pleadings stage on motions to dismiss, we must accept the allegations in appellants' complaints and supporting affidavits as true. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). An action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims. *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968); *Barnes* v. *Merritt*, 376 F.2d 845 (5 Cir. 1967); *York* v. *Story*, 324 F.2d 450, 453 (9 Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); 2A Moore, Federal Practice ¶ 1808, at 2271-74 (1968). Considered in this light, the challenge to the procedures of the HA is as follows.

A. *Termination for Non-desirability.*

Tenants in HA projects are required to sign month-to-month automatically renewable leases which can be terminated at the end of any month by either party upon the giving of one month's notice. Leases are terminated by the giving of one month's notice if the tenant is found to be non-desirable.[1]

If a tenant's undesirable acts persist to the point where the project manager decides he should recommend the termination of the tenancy on the ground of non-desirability, the manager has a meeting with the tenant at which he informs the tenant of his proposed recommendation,

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[1] A family is non-desirable if it constitutes ". . . a detriment to health, safety or morals of its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or a cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants, or a nuisance." Tenant Review Handbook, Ch. VII, ¶ 1, Appendix B at 4.

reviews with the tenant the information in the tenant's folder (which contains the entire history of the tenancy), and discusses the undesirable activity in question. The tenant is given a chance to explan his activity.

If after the meeting the project manager still wishes to recommend termination for non-desirability, the tenant is notified that he may submit a written statement to be sent with the project manager's recommendation and the tenant's folder to the HA Tenant Review Board [hereinafter cited "TRB"].

The TRB consists of eight officers of the HA. They consider the tenant's folder and the project manager's recommendation, and if they make a preliminary determination of the tenant's non-desirability, they inform the tenant in writing that they are "considering a recommendation" of termination, that he may appear before the TRB to tell his side of the case if he requests an appearance in 10 days, and that if he so requests an appearance he will be informed of the nature of the conduct under consideration. If the tenant fails to request an appearance within 10 days, the preliminary determination of non-desirability is made final by the TRB Chairman.

If the tenant makes a timely request for an appearance, he is sent a form letter telling him the time and place of the scheduled hearing, the general definition of a non-desirable tenant (as set out in footnote 1, *supra*), a short, often one-sentence, statement of the nature of the particular non-desirable conduct under consideration,[2] and the fact that he may bring any person to help represent him at the hearing.

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[2] The plaintiffs in the instant cases received the following notification of their non-desirable conduct.

Mr. and Mrs. Rolle: "Record of anti-social activities and arrests of your son, Fred, Jr., constituting a threat to the peace and safety of the community."

Mr. and Mrs. Humphrey: "Illegal acts of Mr. Humphrey, having an adverse effect on the project and its tenants."

A panel of two or more, usually three, of the TRB members is present at the hearing. The HA ordinarily presents no witnesses, but rather has a panel member read a summary of the entries in the tenant's folder. The tenant or his representative is permitted to comment about the entries or question witnesses in that regard. The tenant is generally not permitted to see the contents of the folder, the names of those who complained of his non-desirable activity, or the summary of the entries.[3] The rules and regulations governing the TRB and its panels in non-desirability cases, set out in the TRB "Handbook" are not made available to the tenant, even upon request. No transcript of the hearing is maintained.

Despite the summary notification to the tenant prior to hearing of the conduct under consideration, the panel decides whether the tenant is non-desirable on the basis of the tenant's entire folder;[4] thus the decision may be based in whole or in part on entries in the folder although the tenant received no notification prior to the hearing that the TRB was considering these entries, or indeed the decision may rest in some part on items in the folder about which the tenant is not notified even at the hearing.

If the panel decides that the tenant is non-desirable, the Chairman of the TRB notifies the tenant that the panel has determined that the tenant is ineligible. No findings or reasons grounding the panel's determination are released. Thereafter the HA gives the tenant the required one month's notice under lease to terminate the tenancy, and

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[3] In the case of plaintiff Rolle, upon demand of counsel, the TRB panel permitted counsel to inspect the folder at the premises of the hearing, and offered to grant an adjournment of the hearing if one were requested. In the case of plaintiff Humphrey, however, the folder and the summary of its contents were not made available to the tenant despite repeated requests. Affidavits submitted on behalf of plaintiffs indicate that other tenants, not named in this suit, have been unable to gain access to their folders.

[4] Affidavit of Nancy E. LeBlanc in *Rolle*, January 15, 1967.

notifies the tenant that he should vacate. If the tenant does not vacate, a holdover proceeding is commenced in the New York City Civil Court. The only issue in such a proceeding is the validity of the notice to terminate under the lease, and the determination of non-desirability cannot be put in question. See *New York City Housing Authority* v. *Gantt*, 57 Misc.2d 447, 292 N.Y.S.2d 759 (Civ. Ct. N.Y.C. 1967); *New York City Housing Authority* v. *Russ*, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (App. T. 1954); cf. *Housing Authority* v. *Thorpe*, 267 N. C. 431, 148 S.E.2d 290 (1966), *judgment vacated on other grounds*, 386 U.S. 670 (1967). Levy & Weintraub, *Termination of Public Housing Tenancies*, N.Y.L.J. Dec. 11, 1968, p. 4, cols. 1-4.

The facts as to the instant plaintiffs may be quickly summarized. Proceedings were begun against the Rolles because of the alleged anti-social acts (such as statutory rape) of their son Fred, and against the Humphreys because Mr. Humphrey had been arrested on a narcotics charge several miles from the project. Both requested hearings. Counsel for Rolle demanded a variety of procedural safeguards sought in the present action, such as advance notice of the complete charge, a transcript of the hearing, confrontation and cross-examination of witnesses, an impartial hearing examiner, etc. Although the panel permitted Rolle's counsel to inspect the folder, it did not grant the other requests and Rolle refused to go forward with the hearing. Any further action by the HA with respect to Rolle was voluntarily postponed pending the outcome of this litigation. The Humphreys went through with the hearing although they were not permitted to inspect the folder, and were found to be non-desirable, and were given notice of termination and to vacate. No holdover action was brought due to the intervention of this action.

As to the procedures for termination on the ground of non-desirability, the appellants seek the following relief: (1) an injunction against evictions on this ground unless the following safeguards are afforded in connection with

the hearing: (a) written notice prior to the hearing of all the grounds to be relied on in the decision; (b) notice of the rules and regulations governing the TRB panel at the hearing; (c) inspection of the tenant folder; (d) exclusion of items about which advance notice was not given; (e) confrontation and cross-examination of witnesses; (f) exclusion of hearsay items; (g) right to compel attendance of witnesses; (h) the keeping of a written record of the hearing; (i) impartial hearing examiner; (j) written decision with findings of facts and reasons; and (k) access to prior decisions as precedent; (2) an injunction against using a lease which permits the HA to evict simply by giving one month's notice and thus which permits the HA to evict without the above safeguards; (3) an injunction against the failure of the HA to negotiate new leases which provide safeguards which are constitutionally required; (4) a declaratory judgment that the present procedures are constitutionally deficient; and (5) an injunction against the termination of tenancies on grounds not set out in the lease or otherwise made known and which are too vague.

B. *Termination for Breach of Rules and Regulations.*

Tenants are required to sign the "Tenant Rules and Regulations" upon the execution of their lease agreements. This document is specifically referred to by the lease.

Violation of the rules and regulations is considered to be ground for termination of tenancy. The procedure for termination on this ground is quite simple. If the project manager feels that a tenant is ineligible for continued tenancy by virtue of a violation of the rules and regulations, he holds a meeting with the tenant at which the manager informs the tenant of the alleged violation and the possibility of termination. The tenant may tell his side of the story.

After the meeting, the project manager may decide the tenant is ineligible because of the violation, in which event he forwards the tenant's folder and a recommendation to

terminate to the HA Central Office. The folder contains the manager's report on his meeting with the tenant and the tenant's responses. If the Central Office approves of the manager's determination, a notice to vacate after one month is sent to the tenant. If the tenant refuses to vacate, a holdover proceeding may be instituted as in the non-desirability cases.

The facts in regard to the instant plaintiffs, Mr. and Mrs. Escalera, are simple. For several years the Escaleras had a dog in violation of HA rules. They had been assessed "additional rent" (*infra*) for having the dog. In July, 1967, the project manager asked them about the dog, warning them that keeping the dog violated HA rules. Mr. Escalera informed the manager that the dog had been sold; the manager demanded written proof which was never provided. On September 29, 1967 the Escaleras received notice from the HA to vacate by October 31, 1967. Holdover proceedings were postponed due to the institution of the present suit.

As to the procedures for termination on the ground of violation of the HA rules and regulations, the appellants seek the following relief: (1) a preliminary injunction against the eviction of the Escaleras; (2) an injunction against evictions for rules violations if the tenant has not been afforded an opportunity to contest the reasons for termination; (3) an injunction against lease provisions which permit termination upon the giving of notice without giving reasons or a fair hearing to contest the reasons; (4) an injunction against failure by the HA to negotiate new leases providing at least minimum safeguards; and (5) a declaratory judgment that the present procedures are constitutionally deficient.

C. *"Additional Rent" Charges or Fines.*

The HA lease agreements by reference to the Tenant Rules and Regulations (which must be signed by tenants

along with their leases) permit the HA to charge "additional rent" which must be paid, subject to landlord remedies for nonpayment of rent, in three types of circumstances: (1) for repair of damage to the premises; (2) for additional services provided for a tenant; and (3) for "liquidated damages" caused by a tenant or his family in violating the rules and requirements established by the HA for protection of its property and other tenants.

The amount of the "additional rent" is within the project manager's discretion. The project manager, if he feels an "additional rent" charge is warranted, may impose it after giving notice to the tenant.[5] If the tenant fails to pay the extra charge as part of his rent, the landlord may bring suit in the New York Civil Court to collect unpaid rent.

The "additional rent" charges assessed to instant appellants are as follows. The Humphreys paid a $3 charge for an allegedly clogged toilet. Mrs. Haywood paid a $5 charge for the alleged behavior of her brother, one Mullins, who was not a tenant and was not living in the project, and over whom Mrs. Haywood could exercise little control.[6] Another charge of $10 was assessed for similar acts of her brother, and upon nonpayment and intervention of counsel, the charge was rescinded. The Lockmans were fined three times for alleged conduct of their son: (1) $2 for playing ball on HA property (the Lockmans contend he was on neighboring property); (2) $5 for riding a bicycle on HA walks (the Lockmans contend that he was only repairing the bicycle); and (3) $2 for another ball-playing incident which was reduced to $1 when the Lockmans argued that

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[5] The HA Management Manual requires the project manager to give the tenant an opportunity to tell his side of the story. The manager is also required to summarize the tenant's position and enter the summary in the tenant's folder.

[6] Indeed, Mrs. Haywood attempted to dissuade her brother from visiting the project. She had him committed to a psychiatric ward for observation and she requested HA police to arrest him if he appeared at the project.

the grass would not be harmed due to the snow cover. The Lockmans paid these charges.

As to the procedures for assessing "additional rent" charges, appellants seek the following relief: (1) an injunction against the assessment of these charges without a prior fair hearing with the essential safeguards sought in the termination cases; (2) an injunction against requiring tenants to sign leases purporting to permit the assessment of these charges; (3) an injunction against failure to renegotiate leases; (4) an injunction against any further "additional rent" charges based on standards and conduct which are vague and not specifically made known to tenants; (5) a declaratory judgment that the present procedures are constitutionally deficient; and (6) a money judgment for the amount of the charges paid by Haywood and Lockman.

II

Appellants challenge the constitutionality of the HA procedures for terminating tenancies on the grounds of non-desirability and breach of the rules and regulations and for assessing "additional rent" charges, contending that these procedures deny members of their classes their rights to due process of law. Although the termination of tenancy procedures afforded by the HA in this case admittedly satisfy the requirements of the Department of Housing and Urban Development circular of February 7, 1967, considered by the Supreme Court in *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), this is not dispositive of the question of whether the procedures satisfy the due process requirements of the Fourteenth Amendment. See *Thorpe, supra*, 393 U.S. at 283-84; *In re Williams* (Sup. Ct. Westchester County, April 15, 1970), in N.Y.L.J., April 16, 1970, at 18, col. 5-7. But see *Chicago Housing Authority v. Stewart*, 43 Ill.2d 96, 251 N.E.2d 185 (1969), *cert. denied*, 38 U.S.L.W. 3370 (Misc. No. 1484, March 23, 1970).

Nor is it conclusive in the consideration of appellants' constitutional claims to argue that there is no constitutional right to continue living in public housing projects. See *Chicago Housing Authority* v. *Blackman*, 4 Ill.2d 319, 122 N.E.2d 522, 524 (1954); *Municipal Housing Authority* v. *Walck*, 277 App. Div. 791, 97 N.Y.S.2d 488 (1950); cf. *Lynch* v. *United States*, 292 U.S. 571, 577 (1934) (Brandeis, J.). The government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege. See *Goldberg* v. *Kelly*, 38 U.S.L.W. 4223, 4225 (S. Ct. March 23, 1970); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Hornsby* v. *Allen*, 326 F.2d 605, 609 (5 Cir. 1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1451-54 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968).

Since these actions were dismissed at the pleadings stage, we must view the allegations in the complaints and supporting affidavits in the light most favorable to the appellants, see p. 2579 *supra*; in this light we find that appellants have a claim for relief. Certain aspects of the alleged present HA procedures cannot stand without a convincing showing at trial that the HA has a compelling need for procedural expedition.

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961); *Dixon* v. *Alabama State Bd. of Education*, 294 F.2d 150, 155 (5 Cir. 1961). The minimum procedural safeguards required by due process in each situation depend on the nature of the governmental function involved and the substance of the private interest which is affected by the governmental action. *Goldberg* v. *Kelly*, *supra*, 38

U.S.L.W. at 4225; see *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, *J.*, concurring). Since these competing interests have not been fully developed at the trial level, it is not now appropriate for this court to prescribe the minimum necessary procedural requirements. However, if appellants can show at trial the existence of certain of the pleaded HA procedures, we hold that they will have made out a prima facie case for relief; the exact nature and extent of that relief can only be determined after trial.

A.

We consider first the procedures for terminating tenancies on the ground of non-desirability. We find this procedure may be deficient in four respects. First, summary notice such as that sent to the tenants here of the non-desirable conduct under consideration by the TRB is inadequate. See *In re Williams*, *supra* at col. 7. The one-sentence notices sent to the present appellants were insufficient to notify them even of the particular conduct thought by the TRB to be most serious. But since the TRB bases its decision on the tenant's entire folder, detailed notice as to the particular conduct thought to be most serious would be inadequate to give the tenant advance notice of all the items which might be considered against him so that he might challenge these items.

The purpose of requiring that notice be given to the tenant before the hearing is to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence. The instant one-sentence summary notices are inadequate for this purpose. *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 105, 107 (1963); *Dixon*, *supra*, 294 F.2d at 158-159. Nor does the conference between the project manager and the tenant cure the deficiency in the notice, see *Goldberg* v. *Kelly*, *supra*, 38 U.S.L.W. at 4227, since

the manager does not divulge all entries in the folder some of which may influence the TRB's decision.

Second, denying tenants access to the material in their folders, when the entire folder is considered by the TRB in its determination of eligibility, deprives the tenants of due process. *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4227. A hearing at which the tenant can rebut evidence against him would be of little value if the TRB's ultimate decision can rest on items in the tenant's folder of which he has no knowledge and hence has had no opportunity to challenge. *Willner, supra,* 373 U.S. at 107 (Goldberg, J., concurring).

If secrecy must be preserved as to some items in the tenant's folder, then these items may not be relied on in the decision of the HA. The decision must be based solely on the evdence adduced at the hearing. *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4227. Although it is unnecessary to write a full judicial opinion, the HA should "demonstrate compliance with this elementary requirement" and "state the reasons for [its] determination and indicate the evidence [it] relied on." *Id.* at 4227; see *In re Williams, supra* at col. 7.

Third, denying the tenant the opportunity to confront and cross-examine persons who supplied information in the tenant's folder upon which HA action is grounded is improper. *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4227; *Willner, supra,* 373 U.S. at 107 (Goldberg, J., concurring); *In re Williams, supra* at col. 7; see *Dixon, supra,* 326 F.2d at 159. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4227.

Under the present procedures, it appears that often the tenant is not even advised as to the source of many of the entries in his folder; preliminary disclosure of this information is, of course, necessary before the tenant can decide whether to confront the person supplying the damaging

entry in his folder. If disclosure of the names of persons supplying information in the folder, or the subsequent confrontation at a hearing between the tenant and such persons is deemed to be undesirable because of possible hostility amongst housing project neighbors, the HA may not base its determination on such information. *Goldberg v. Kelly, supra*, 38 U.S.L.W. at 4227; see *Alderman v. United States*, 394 U.S. 165 (1969); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

Finally, we find that the HA's failure to disclose the rules and regulations in the TRB Handbook governing the TRB panel at the hearing concerning termination for nondesirability may be found to be improper. See *Goldberg v. Kelly, supra*, 38 U.S.L.W. at 4227 ("The decision maker's conclusion as . . . must rely solely on the *legal rules* and evidence adduced at the hearing" [emphasis added]). Appellants allege that this information is necessary to adequate preparation of the tenant's substantive case before the TRB. If this is established at trial, these regulations must be made generally available prior to the hearing. The HA's argument, that the regulations contained in the Handbook are merely internal procedural guidelines, may be considered by the trial court in determining whether, in fact, the Handbook is necessary in preparing a tenant's case before the TRB.

B.

Next, we consider the procedures for terminating tenancies on the ground of violation of rules and regulations and for assessing "additional rent" charges. Each procedure would seem to suffer the first three deficiencies of the TRB procedure. The tenant should be notified in advance of the complete grounds for the proposed action; should have access to all the information upon which any decision will be based, and should be afforded the right

to confront and cross-examine witnesses in appropriate circumstances. In addition, it would seem that the tenant should be afforded the opportunity to present his side of the case in the presence of an impartial official, not merely to the project manager who instituted the proposed action against the tenant.[7] *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4227; cf. *In re Murchison,* 349 U.S. 133, 136 (1955); *Wasson* v. *Trowbridge,* 382 F.2d 807, 813 (2d Cir. 1967); compare Administrative Procedure Act § 5, 5 U.S.C. § 554 (1966); Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects,* 77 Yale L.J. 988, 994, 1004-05 (1968).

Although a full-fledged adversary hearing need not be afforded in all cases, the tenant must be adequately informed of the nature of the evidence against him and accorded an adequate opportunity to rebut the evidence. *Willner, supra,* 373 U.S. at 107 (Goldberg, J., concurring). Indeed in the cases of violations of rules and regulations and of "additional rent" charges, the evidence against the tenant is quite likely to come from third parties. In such cases, the tenant should be permitted to challenge the person supplying that evidence. The language of Mr.

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[7] In the case of termination on the ground of non-desirability, the TRB as a whole must approve the project manager's recommendation to terminate before there can be an appearance by the tenant before a panel of the TRB. Although this initial TRB approval of the manager's recommendation becomes final if the tenant does not request a hearing, we are not convinced that the panel members' involvement in the initial approval precludes their unbiased participation on the panel at the hearing reviewing the recommendation of the project manager. See *Goldberg* v. *Kelly,* 38 U.S.L.W., *supra,* at 4227 ("[P]rior involvement in some aspects of a case will not necessarily bar [an] official from acting as a decision maker. He should not, however, have participated in making the determination under review."); *In re Williams* (Sup. Ct. Westchester County April 15, 1970), in N.Y.L.J., April 16, 1970, at 18, col. 5, 7; cf. *Gonzales* v. *United States,* 364 U.S. 59, 63 (1960); *Marcello* v. *Bonds,* 349 U.S. 302, 311 (1955).

Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Comm., supra,* is apt:

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." 341 U.S. at 171-172.

The HA's argument that the "additional rent" charges are provided for in the HA lease is not dispositive of the question of the fairness of the procedures under which said charges are imposed. *Holloway* v. *Department of Housing and Urban Development,* No. 27182, 418 F.2d 242 (5 Cir. 1969); see *Vinson* v. *Greenburgh Housing Authority,* 29 A.D.2d 338, 288 N.Y.S.2d 159 (1968), *leave to appeal granted,* N.Y.2d (1969). Nor is it persuasive in the posture of this case to argue that a tenant may challenge the additional rent charges by refusing to pay them and by defending in court against the HA's suit for nonpayment of rent. The cost of defending in court and the hazards envisioned by a public housing tenant in refusing to pay rent, would probably dissuade all but the boldest tenant from contesting an "additional rent" charge in this manner. Nor can the small size of the "additional rent" charges be relied on to deny tenants automatically fair procedures. To be sure, the size of the charges is relevant to the question of the burdensomeness of the required procedures, but even small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level. See *Goldberg* v. *Kelly, supra,* 38 U.S.L.W. at 4225.

III.

The rest of the HA's arguments will be discussed briefly.

A. *Jurisdiction, Substantiality, Case or Controversy, and Abstention.*

First the HA argues that the present action does not come within the grant of jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343(3) (1962), contending that appellants are claiming at most a deprivation of property which was not comprehended by the Civil Rights Act. See *McCall* v. *Shapiro*, 416 F.2d 246 (2d Cir. 1969); *Bradford Audio Corp.* v. *Pions*, 392 F.2d 67 (2d Cir. 1968); *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 531-32 (1939) (Stone, *J.*, concurring). Unlike the cases cited which involved property rights (and incidental civil rights), the instant actions allege deprivations of procedural due process, a civil right, which may ultimately lead to the loss of a property right, to wit, tenancy in public housing projects. The present challenges are quite similar to the challenges to the procedures for admission into public housing, which we held we had jurisdiction to consider in *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968), and to the challenges to the procedures for terminating welfare benefits considered by the Supreme Court, *Goldberg* v. *Kelly*, *supra*, *Wheeler* v. *Montgomery*, 38 U.S. L.W. 4230 (S. Ct. March 23, 1970). See *Holloway*, *supra*; *Quevedo* v. *Collins*, 414 F.2d 796 (5 Cir. 1969); *Lewis* v. *Housing Authority*, 397 F.2d 178 (5 Cir. 1968); *Ruffin* v. *Housing Authority*, 301 F. Supp. 251 (E.D. La. 1969).

Since only the constitutionality of the procedures used by the HA are in question here, our jurisdiction in this case does not require the federal courts to undertake the review of the merits of every HA action taken in regard to tenants. Such review properly remains in the jurisdiction of the appropriate state courts. See, Note, *Public Landlords*,

and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects, 77 Yale L.J. 988, 1003 (1968).

Next the HA contends that these actions lack a substantial federal question and that they do not constitute a case or a controversy. As shown above, the pleadings present a meritorious as well as a substantial federal question. See *Commonwealth of Pennsylvania* v. *Brown*, 260 F. Supp. 323 (E.D. Pa. 1966), *rev'd on other grounds*, 373 F.2d 771 (3 Cir. 1967). *In Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) the Supreme Court did not consider the requirement of procedural safeguards beyond those provided in the HUD circular.

The HA argues that there is no case or controversy because no eviction suits have been filed against any named plaintiffs, because no actions to collect unpaid "additional rent" charges have been commenced against any plaintiff, and because no plaintiff has shown how the requested procedures would have affected the HA's action against them. The fact that the HA suspended its procedures to evict the named plaintiffs after the institution of these actions cannot deprive these actions of their controversial nature. The imminence of eviction at the outset of this action provides sufficient controversy. See *Goldberg* v. *Kelly*, *supra*, 38 U.S.L.W. at 4223 n. 2. The same is true of the imminence of the HA actions in state courts to collect unpaid "additional rent" charges. Clearly there is a controversy over the rent charges which have already been paid. Finally, the requested relief in all actions would have afforded the named plaintiffs information which would have been useful in meeting the HA's case against them.[8]

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[8] In the case of Lockman, confrontation and cross-examination of the persons reporting the alleged ball playing and bicycle riding might have revealed errors in the reports. In Escalera's case, disclosure to the tenant of the folder may have enabled the tenant to

(*footnote continued on following page*)

Next, the HA contends that this is an appropriate case for the federal courts to abstain, allowing the claims in these actions to be determined by the state courts in the first instance. *Sibron* v. *New York*, 392 U.S. 40, 58 (1968); *Zwickler* v. *Koota*, 389 U.S. 241, 249-50 (1967); *Randell* v. *Newark Housing Authority*, 384 F.2d 151 (3 Cir. 1967), *cert. denied sub nom. Avent* v. *Newark Housing Authority*, 393 U.S. 870 (1968). We rejected the identical argument of appellee HA in *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). We are not dealing here with the administration of a complex state process in which state courts have greater expertise. The actions here are not entangled in state law. Rather, the only issues here are whether certain HA procedures pass muster under the due process clause of the Fourteenth Amendment to the federal Constitution. Federal courts are fully competent to consider such issues and are the primary forum for vindicating federal rights.

B. *State Review.*

We have already considered and rejected the HA's contention that the procedures for assessing "additional rent" charges are cured by the opportunity of the tenant to defend a rent-collection action in the New York Civil Courts. The HA also contends that any defects in the challenged procedures for terminating tenancies are cured by the availability of an action commenced by the tenant in New York Civil Court under N.Y.P.L.R. article 78. New York

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(*footnote continued from previous page*)

dispel the project manager's belief that they still possessed a dog. In the Humphrey's case, disclosure of the folder may have enabled Mrs. Humphrey to paint her family in a more acceptable light than the folder did, and the decision to terminate was grounded on the entire folder, not just the arrest and conviction of Mr. Humphrey. The same argument applies in the case of Rolle. (There is still a question of exhaustion of administrative remedies in the case of Rolle; see *infra*.)

Civil Practice Law and Rules §§ 7801-06 (McKinney, 1963). See *Randell* v. *Newark Housing Authority, supra.*

Although upon commencement of an article 78 action, the holdover action by the HA may be stayed, the tenant must in effect prove that the HA decision was arbitrary and capricious or an abuse of discretion in order to get relief. Thus, the tenant has the burden of commencing an article 78 action and of overcoming the presumption of regularity attacking the acts of the HA. Moreover, the tenant must carry this burden without access to his own folder, the exact basis for the HA decision against him or a transcript of the TRB hearing.[9] Such review commenced by the tenant cannot be a substitute for fair procedures in the decision of the HA in the first instance.

C. *Findings Below.*

It is not clear whether the decision below was a dismissal under Rule 12(b) of the Federal Rules of Civil Procedure or whether it was a summary judgment under Rule 56. In either event, several of the findings of fact made by the trial court below are in error, either because all favorable inferences were not given the complaint and supporting affidavits as required if the dismissal were under Rule 12(b), or because facts were found where the pleadings indicated that there was a genuine issue of material fact. Federal Rules of Civil Procedure, Rule 56(c).

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[9] Although the HA may be required to reveal a ground for its action in defense of an article 78 action, see *Vinson* v. *Greenburgh Housing Authority*, 29 A.D.2d 338, 288 N.Y.S.2d 159 (1968) (two judges dissenting), *leave to appeal granted*, —— N.Y.2d —— (1969), it is not required to present the tenant's entire folder to the article 78 court nor to substantiate the entries therein in an adversary proceeding. See also, *Pittsburgh Housing Authority* v. *Turner*, 201 Pa. Super. 62, 191 A.2d 869 (1963); *Columbus Metropolitan Housing Authority* v. *Simpson*, 85 Ohio App. 73, 85 N.E.2d 560 (1949); *Chicago Housing Authority* v. *Ivory*, 341 Ill. App. 282, 93 N.E.2d 386 (1950).

It suffices simply to mention these erroneous findings. First, the finding that notice of the non-desirable conduct was given to the tenant—notice here was summary and inadequate. Second, the finding that the HA published its rules governing the TRB panel proceedings in non-desirability cases—this finding is unwarranted in the face of appellants' allegations to the contrary.[10] Finally, the finding that tenants were permitted to inspect their folders before the TRB hearing—this is exactly contrary to the allegations in the Humphrey complaint and in supporting affidavits.[11]

D. *Exhaustion of Administrative Remedies—Rolle.*

While ordinarily we would dismiss appellant Rolle's appeal, since she did not go through with the TRB hearing when her procedural requests were denied; see *McKart* v. *United States*, 395 U.S. 185, 194-95 (1969); cf. *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), we will not yet dismiss her action for failure to exhaust available administrative remedies. It is true that if Rolle had proceeded through the TRB hearing, the initial determination of ineligibility against her might have been reversed.

But since Humphrey has brought an identical action and has exhausted his TRB remedies, and since Humphrey sues on behalf of the class of all tenants similarly situ-

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[10] The fact that appellants had possession of a portion of a dated copy of the TRB Handbook does not conclusively contradict their allegation of non-disclosure of the current rules and regulations.

[11] The fact that the HA offered inspection of the file in Rolle's case does not contradict the allegations as to the general procedures. The record seems to justify the conclusion that the offer in Rolle's case was extraordinary, and was brought on by fear of the instant litigation. Indeed, appellee's affidavit does not even state that tenants are permitted to inspect their files. It states only that upon request *data in the folder* is made available to the tenant or counsel.

ated,[12] we hold that Rolle should be permitted to continue as a named plaintiff in these actions.[13]

E. *Validity of the Classes.*

Although the facts leading to the HA action in the case of each named plaintiff were different, the procedures used in each type of action were identical.[14] This provides the common question of law and fact for the members of the respective classes. Rule 23(b)(2), Federal Rules of Civil Procedure; *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968); *Wheeler* v. *Montgomery*, 38 U.S.L.W. 4230 (S. Ct. March 23, 1970) (class action on behalf of all recipients of old age benefits subject to California welfare termination provisions); see *Quercdo* v. *Collins*, 414 F.2d 796 (5 Cir. 1969). If appellants' allegations as to the other prerequisites of Rule 23(a) are established at trial, then their classes will be properly constituted.

IV.

The minimum procedural requirements of due process under the Fourteenth Amendment must reflect the balance between the government's interest in efficient administration and the nature of the individual's interest being affected by governmental action. We hold only that granting every favorable inference to plaintiffs' complaints and affidavits, it appears that the HA's procedures are deficient

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[12] The question is still open whether Rolle's claim is representative of the typical claims of the class. See Rule 23(a), Federal Rules of Civil Procedure. Rolle, unlike many other allegedly non-desirable tenants, was given access to his file prior to the TRB hearing.

[13] Any relief won by the class would apparently be available to Rolle in the future; and the HA seems to hint that Rolle is still entitled to a hearing before a panel of the TRB, since no action has been taken against her as yet, after her initial refusal to participate.

[14] The one exception is the TRB panel's offer to allow Rolle to inspect his file before the hearing. See note 11, *supra*.

in several specific aspects. Upon trial, the HA may be able to show great need for expedited procedures, or the plaintiffs may fail to substantiate all of their allegations. Therefore the fashioning of a remedy or a declaratory judgment must await the full trial of these actions.[15]

Reversed and remanded for consideration of plaintiffs' motion for preliminary relief and for trial on the merits.

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[15] We express no opinion on the validity of the HA's substantive grounds for taking the three types of actions in this case. The substantive questions are not in issue. See Note, *Public Landlords and Private Tenants: The Evictions of "Undesirables" From Public Housing Projects*, 77 Yale L.J. 988, 1003 (1968).

Appendix B—Opinion of United States District Court

CLARENCE HUMPHREY et al. v. NEW YORK CITY HOUSING AUTHORITY et al.

ROSE LEE ROLLE v. NEW YORK CITY HOUSING AUTHORITY et al.

PEDRO ESCALERA et al. v. NEW YORK CITY HOUSING AUTHORITY et al.

WALTER LOCKMAN et al. v. NEW YORK CITY HOUSING AUTHORITY et al.

Endorsement

67 Civ. 4236
67 Civ. 4306
67 Civ. 4307
67 Civ. 4414

Plaintiffs are tenants in public housing projects; defendants are the New York City Housing Authority, a corporate Governmental agency which owns and operates a public housing program in New York City in which more than 144,000 families numbering 525,560 persons are housed in 157 public housing projects constructed at a cost of over $2,000,000,000. Financial assistance, in the form of loans, subsidies and guarantees to provide funds for the construction of public housing, is supplied by the federal, state and city governments. Its officers are named as individual defendants.

All the suits seek an injunction and a declaratory judgment to redress alleged deprivation of civil rights of plaintiffs and members of their class, specifically the due process rights guaranteed by the Fourteenth Amendment. Jurisdiction is predicated on 28 U.S.C., 1343(3), 2201, 2202; 42 U.S.C. 1983 and 42 U.S.C. 1401—the United States Housing Act of 1937.

Defendants have moved to dismiss the suits for lack of jurisdiction, failure to state a substantial federal claim and, in the ROLLE and ESCALERA suits, for failure to exhaust administrative remedies. Alternatively, defendants urge this Court to dismiss these suits under the doctrine of absention for failure of plaintiffs to exhanst administrative remedies and because of the underlying questions of State Law.

Plaintiffs by orders to show cause also seek to enjoin the defendants pendente lite (1) from evicting plaintiffs and other tenants and from assessing fines against them without a hearing conducted in accordance with 11 listed conditions; (2) from continuing to require tenants to sign a lease and rules and regulations permitting fine or eviction without appropriate hearing; (3) from refusing to negotiate a new lease which complies with the Constitution and laws of the United States; and (4) from continuing to enforce the policy of evicting tenants on the standards presently used, which are claimed to be vague and arbitrary and in violation of plaintiffs' rights under the Fourteenth Amendment and the United States Housing Act to their irreparable harm. This is also the ultimate relief sought in the complaints.

The actions fall into two groupings: the eviction of tenants on a finding of "non-desirability" and on a finding of violation of rules and regulations. All plaintiffs, however, complain of the absence of what they describe as a procedural hearing prior to eviction or fine and of vague and arbitrary standards for determining their status or culpability. The specific due process of which they charge they are being deprived is, among other things, lack of opportunity to cross examine witnesses, lack of a stenographic record of the proceedings, failure to apprise the tenant adequately of the charges in advance, the rules and regulations which govern the proceedings, and absence of an impartial examiner. In short, complaint is made of the lack of adversary full trial-type proceeding.

Each suit is brought as a class action on behalf of all tenants of public housing projects in the City of New York, too numerous to join and as to whom there are common questions of fact and law, who are now affected or may in the future be affected by defendant's policies and practices with regard to termination of tenancy on the basis of alleged non-desirability or on the basis of alleged breach of the defendant's rules and regulations without being accorded an opportunity to contest their termination of the tenancy or validity of the regulations in an administrative or judicial hearing. Plaintiffs allege that they and members of their class are required to sign, prior to occupancy, a standard form lease and Tenant Rule and Regulations, copies of which have been annexed to the complaints.

Plaintiff in the Rolle complaint alleges that she was notified in writing by the Tenant Review Board that it was contemplating terminating her tenancy on the ground of her non-desirability; that she requested an appearance to contest the termination of her tenancy; that this was granted but that, on the return date, represented by counsel she refused to go forward with the hearing because defendants would not comply with her request that the hearing be transcribed, that a person with actual knowledge of the facts be present, that she be given advance written notice of the charges, and that an independent examiner be used to adjudicate her claims. She alleges that she was given an opportunity to examine the Housing Authority tenant's file and offered an adjournment for further preparation, which she refused. She alleges that she was informed by letter (which is attached to the complaint) of the standards defining a non-desirable tenant and of the charges which, in her case, were that the nature of the nondesirable conduct or behavior was the "record of anti-social activities and arrests of your [her] son, Fred Jr., constituting a threat to the peace and safety of the community."

The denial of due process as alleged is claimed to lie in the failure of defendants to make available its "secret" rules and regulations regarding standards for continued occupancy which are contained in a Tenant Review Board Handbook of the New York City Housing Authority, and in the failure to afford to her the type of hearing she requested. It is alleged that, as a result, she faces a determination of ineligibility with no opportunity to contest the determination of her tenancy in the State court summary proceedings because the lease allows defendant to terminate the tenancy and evict without stating a cause or reason and without a hearing on the merits.

Although it is not alleged in the complaint, it appears undisputed from the affidavits that the anti-social activities and threat posed by Fred, Jr., were evidenced by two prosecutions for assault and robbery, for which he was imprisoned, and an arrest for rape.

Since plaintiff refused to go forward with the hearing which would have permitted her to present any matter in defense she chose, there has been no final determination as to her non-desirabilty and her claim of irreparable injury is not factually supported.

Plaintiffs in the Humphrey complaint allege that they have been notified by defendant that their tenancy has been terminated and that summary proceedings will thereafter be commenced to remove them from their apartment. They have also been notified that they have been assessed a charge of $3 as additional rent for correcting a toilet stoppage.

Plaintiff Haywood in this same complaint alleges that she has been repeatedly fined by defendant in the form of assessments of additional rent without any hearing whatsoever on the basis of alleged acts of her brother who is not a tenant, who does not reside with her, and over whom she has no control whatsoever. She has, she says, for this reason, been subject to a continuous course of a harassment by defendant and that defendant was contemplating termination of her tenancy.

As in the Rolle complaint, the Humphreys allege that they received a notice from defendant that termination of their tenancy was being contemplated and that the Tenant Review Board would hear their case. Defendant's letter set forth the standards used for determining and defining an undesirable tenant, and also referred to the illegal acts of Mr. Humphrey as the matter under consideration by the Tenant Review Board.

It is also alleged that Mrs. Humphrey had been summoned to the project office and informed that termination of her lease would be recommended as a result of her husband's arrest at a place several miles from the housing project on a narcotics charge. It is alleged that they attended a conference conducted by the Tenant Review Board at which they were assisted by counsel, who requested a statement of the charges with a specification of the time, place and nature of the matters to be considered at the hearing, which was denied.

The complaint further alleges that a member of the Tenant Review Board then read aloud what purported to be a summary of the entries in the "dossier" maintained by defendant with regard to the Humphrey family; that neither this summary nor the record itself was made available to plaintiffs Humphrey or their attorney; and that when the relevance of some of the events described were challenged by counsel, Board members replied that they did not consider the particular incident serious but that it helped to establish a general impression of the family and was, therefore, properly before the Board. None of these charges are to be found in plaintiffs' supporting affidavit nor in that of counsel, who was present.

It is charged that the Board did not make available to plaintiffs or their counsel the standards or the regulations by which the Board was guided in its determination, which disclosure would have enabled the Humphreys to establish that they were not non-desirable.

It appears from defendant's affidavit that Humphrey was convicted of the narcotics violation for which he had

been arrested and that the determination of ineligibility was based on that conviction. A final determination has been made in the Humphrey matter and they have been served with notice to evict and of holdover proceedings in the Civil Court.

With respect to the $3 fine, they allege that it bears no relation to the cost of repair and is imposed merely as a punitive measure.

No scale of charges was made available to the tenants. No steps have been taken to collect the $3 "fine" imposed and, if it is resisted, defendant can resort to a proceeding in the Civil Court to collect it as additional rent, at which time plaintiffs can enter any defense they may have.

Plaintiff Haywood alleges that, on numerous occasions within the last three years, she has been called to the office of the Manager of the housing project where she resides because of nuisances alleged to have been committed by her brother on the premises of the housing project while visiting her and that she has been fined on several occasions for these nuisances.

She alleges also that she was directed to institute legal proceedings against her brother in several State courts and was warned that, if these steps were not taken, a Tenant Review Board proceeding against her would be instituted. Subsequently, plaintiff Haywood's rent was refused because the "fine" of $10 was not included therein. However, upon intercession of her counsel, this "fine" was rescinded by defendant. It is alleged that these "fines" and "threats" are an indication of harassment of plaintiff Haywood by employees of defendant and that "she has never been afforded a hearing at which she could defend herself", and is now threatened with Tenant Review Board proceedings. No action appears to be contemplated against this tenant.

Plaintiffs allege in the Lockman complaint that they have been repeatedly "fined" by defendant "in the form of assessments of additional rent without any hearing

whatsoever on the basis of alleged acts of misbehavior by their 3 children; that fines of $2, $1 and $5 have been imposed because the children rode their bicycles, played ball and walked in areas where such activities were prohibited by the regulations. Plaintiffs allege that the charges were unjustified.

It is plaintiffs' claim that their rights were violated because they were never given an opportunity to attend a hearing to challenge the facts upon which the several "fines" were imposed, nor were they informed as to how the amount of "fine" had been determined, nor was an opportunity given to present evidence and to examine the persons who had provided the information to defendant with respect to the incidents upon which the "fines" were based. Plaintiffs say that there is no requirement in the Tenant Rules and Regulations that the tenant be advised of the reason for the additional rent charge or that he have any opportunity to reply; that no schedule of charges has been established nor a method for affixing responsibility has been made available to tenants, and that this provision of the Tenant Rules and Regulations is a basis for "fining" tenants for behavior disapproved of by Housing Authority employees "without regard to the cost of repair or additional services."

In addition to the injunctive relief above outlined, plaintiffs seek a judgment in their favor for the "amount of fines unconstitutionally collected from them plus interest" and that defendant be enjoined from imposing fines and assessing additional rent (as fines) other than by legal action for damages and from proceeding further without affording to the plaintiffs the protection available to persons accused of crime.

Here, too, no action is contemplated against this tenant.

The Escalera complaint alleges that plaintiffs Escalera and Gallagher have been notified by the Buildings Manager that their keeping of a dog on the premises is in violation of the rules and regulations; that they have been notified

by defendants that their tenancy would be terminated and that summary proceedings would be commenced to remove them from their respective apartments; and that they have had the dogs for sometime with the defendant's full knowledge.

The Escalera complaint alleges that plaintiffs have disposed of their dog and so informed defendant; and that they have been fined $10.00 without affording them an opportunity to be heard on the validity of the fine. The plaintiff Gallagher alleges that she is 69 years old, lives alone without a telephone and, because of infantile paralysis, is without the use of her right leg. Because some people attempted to break into her apartment two years ago, she acquired a small dog for companionship and protection. Both plaintiffs allege that they will not be allowed to present their defenses to the Housing Authority's action in a holdover proceeding, and that they have had no opportunity to be heard in an administrative hearing. They also assert that "no opportunity will be afforded them in a judicial hearing, despite the fact that they believe that there is no basis for terminating their tenancy and that they have good and meritorious defenses to the Housing Authority's action which could be established at a judicial or administrative hearing."

We note that, attached to the complaint, are the rules and regulations of which complaint is made. In spite of the fact that both tenants were or are in clear violation of the rules, their cases were reviewed prior to the time they were served with a notice to vacate.

Both sides have submitted affidavits and exhibits containing factual recitals relating to the eviction proceedings and the activities of the plaintiffs, which precipitated them. None of these are in substantial dispute.

We have considered all the affidavits to aid us in determining whether plaintiffs' complaints of deprivation of due process in their eviction proceedings are supported by facts which entitle them to relief. The fact that the com-

plaints, on their face, plead federal claims—denial of due process—does not compel this Court to assert jurisdiction without inquiry into their substantiality (Commonwealth of Penn. v. Brown, 260 F. Supp. 323, 373 F. 2nd 771; Randell v. Newark Housing Authority, 384 F. 2nd 151 (both 3rd Cir., 1967)). Particularly is this so where procedural due process underlies the claim of injury, and defendants maintain that their procedures are in full accord with such concept. In these cases, the question of jurisdiction is so intimately tied to their merits as to compel a determination of both (Commonwealth of Penn. v. Brown, supra.)

There is no claim made that plaintiffs are being evicted for having engaged in a constitutionally protected activity, or by reason of race, color or creed (Thorpe v. United States, 386 U.S. 670; Norwalk Core v. Norwalk Redev. #31761 (C.A. 2, June 1968)).

The facts are undisputed that they are being evicted for conduct and acts which, in the opinion of the New York City Housing Authority, impair the successful operation of the housing project by interfering with and preventing the quiet enjoyment of the other tenants to the property (Thorpe v. Housing Authority, supra). It is not for this Court to substitute its judgment of what conduct or acts may or may not have a deleterious effect on the successful operation of these worthwhile governmental activities; of these matters, the Court's lack of expertise is patent. The only question under judicial scrutiny is the method used to evict or fine these plaintiffs.

Before passing on to the procedures set out by the defendants for evicting tenants, we hold, however, that in no complaint filed as a class action are sufficient facts pleaded to define any class or to support a class action. In some of the "fine" cases, a justifiable controversy is not present. These tenants have been fined; they have or have not paid the fine; they are enjoying their housing as tenants; some tenants have dogs, others have children, who have infringed the rules, and still others have unde-

sirable relatives; some have submitted to administrative hearings and others have refused to do so. Save for the possible common fate of threat of eviction which awaits all tenants, be they in public or private housing, for breach of lease provisions or non-payment of rent, these various plaintiffs share no common question of fact.

From the affidavit of Ira S. Robbins, Vice Chairman of the New York City Housing Authority, and the exhibits attached to defendants' as well as to plaintiffs' papers, it appears undisputed that the Authority, in accordance with power granted to it under the Public Housing Law (Sec. 37 (1w)), to adopt rules and regulations, has adopted and published regulations which establish the standards of desirability to determine a tenant's eligibility for continued occupancy and procedures governing the action to be taken in imposing rent charges and processing non-desirable cases prior to the institution of action to terminate the tenancy. The Authority has also adopted procedures to govern the action of its employees in processing non-desirability cases of tenants under consideration for termination of tenancy. These procedures range from an initial discussion and interview with the Building Manager in an effort to explain the charge, hear the tenant and correct the problem, to a hearing before the Tenant Review Board, composed of three members of the Authority, one of whom is an attorney. This is done after written notice to the tenant setting forth the standards of non-desirability and the specific undesirable conduct, and granting the tenant permission to appear by counsel, to inspect the file and to make oral or written statements in his defense. A final review by the Chairman of the Board is then had. If final decision to evict the tenant is made, he is served with a Notice to Vacate, which may be stayed for as long as six months and which he may review in Court under an Article 78 proceeding, Section 7801 C.P.L.R. Numerous such suits have been brought in the State courts. The act of termination of the tenancy is the final step in a se-

quence of procedural steps taken with the fullest regard for the tenant's rights and those of the other tenants.

Similarly, the procedures which govern the imposition of additional rent charges are published in a manual entitled "Management Manual" "Rent and Rent Collection". These procedures provide for interview of tenant by the Manager, affording the tenant an opportunity to present his explanations; and this must be done before the Manager can impose the additional rent charge and add it to the monthly rent. These fines or charges are provided for in the lease and the tenant has the right and opportunity to dispute the charge and to defend its imposition in non-payment proceedings in the Civil Court of the City of New York (New York Real Property Actions and Proceedings Law, Article 7). The categories for which additional rent charges are imposed, are reasonable and reflect the experience of defendant in attempting to operate and police these public housings.

There is nothing secret about the standards of eligibility or the rules and regulations and about the charges that may be added to the rent for infractions. In fact, it is one of plaintiffs' ridiculous complaints that tenants are compelled to sign leases containing such regulations and an agreement to pay additional rent as "fines" for their violations, thus giving them fair notice that they may be evicted if they fail to observe the regulations.

Moreover, the leases provide for termination of the tenancy by either side on 30 days' notice. The standards of non-eligibility were admittedly furnished in writing to the tenants at the inception of their eviction procedures. Their rash and unsupported charges "on information and belief", that the standards for non-eligibility set forth in the notice are not those used to evict, are an admission of the weakness of their attack on the procedures. It appears that counsel is well informed as to all these procedural matters as attached to the Rolle papers as an exhibit, are found the Tenant Review Board Handbook—a Guide to

the Processing of Termination of Tenancy Actions on the Ground of Non-Desirability; and attached to all the complaints are the leases and Rules and Regulations.

We are convinced that the procedures set up by the Authority which handles more than 800 evictions a year conform to the standards of due process. They go far beyond those approved by the Court in Randell v. Newark Housing Authority, 384 F. 2nd 151 and adopted by the Department of Housing and Urban Development, which impelled the Court in Thorpe v. United States, supra, to stay its hand and remand to the State court for consideration of the procedures.

The Fourteenth Amendment ". . . does not require a trial-type hearing in every conceivable case of government impairment of private interest . . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (Cafeteria Workers v. McElroy, 367 U.S. 886, 894, 895 (1961).)

Plaintiffs seek to have this Court become concerned over the fact that non-desirability may be predicated on criminal activity of tenant, ownership of a dog, a bicycle ride, a ball game, or sanitary facilities. As Judge Hays had occasion to remark in this proliferating field of litigation, "the federal courts cannot administer the housing program"; nor, we add, are they competent to do so. (Norwalk Core v. Norwalk Redevelopment Agency, June 7, 1968, #31761.)

Motion to dismiss the complaints granted; the Clerk is directed to enter forthwith judgment of dismissal upon the merits. So ordered.

Dated: October 31, 1968

/s/ Sylvester J. Ryan
U.S.D.J.

Appendix C—Order of Three-Judge District Court, Southern District of New York, 68 Civ. 394, 68 Civ. 84, Dec. 13, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN KELLY, et al.,

Plaintiffs,

RUBY SHEAFE, et al.,

Plaintiffs,

and

TERESA NEGRON, et al.,

Intervenor-Plaintiffs,

against

GEORGE K. WYMAN, et al.,

Defendants.

The plaintiffs in these consolidated causes having moved this court for (1) a preliminary injunction staying the operation of 18 N.Y.C.R.R. 351.26(a) and (b), (2) an order dissolving the stay of discovery proceedings previously entered by the Honorable Frederick van Pelt Bryan, District Judge, (3) an order permitting them to amend the complaint in the consolidated case, and (4) an order permitting them to add twelve intervenor-plaintiffs in the action, and the defendants having moved this court for summary judgment, and these motions having been considered by this court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the United States as amicus, and the hearings held to date, and the opinion of this court dated November 26, 1968, and this court having

found in said opinion that discontinuance of public assistance benefits without the opportunity for a prior hearing meeting the due process standards spelled out therein causes irreparable injury to recipients of public assistance wrongfully terminated and is a violation of the rights secured to them by the fourteenth amendment to the Constitution of the United States, it is

ORDERED, ADJUDGED AND DECREED THAT

1. Pending further order of this court or termination of this action, defendants and their officers, employees and agents are hereby enjoined and restrained from directly or indirectly discontinuing, or notifying recipients of an intent to discontinue, financial assistance pursuant to the state's public assistance programs in the manner prescribed by 18 N.Y.C.R.R. 351.26(b).

2. Plaintiffs' motion for a preliminary injunction staying the operation of 18 N.Y.C.R.R. 351.26(a) is denied, on the condition that 18 N.Y.C.R.R. 351.26(a) be construed to require, with respect to discontinuing, or notifying recipients of an intent to discontinue, said financial assistance, the following:

(a) Notice of the proposed action must be mailed to a recipient at least seven days prior to the proposed effective date, advising the recipient of the reasons for the proposed action and his right to appear in person at a hearing before a review officer.

(b) There must be disclosure to the recipient at such hearing of the evidence, including the source thereof, relied upon for the proposed action and an opportunity for the recipient to confront and have questioned a person so disclosed if the value of his evidence depends upon his credibility and the latter is brought into question, unless secrecy in a particular case can be demonstrated to be an important interest of the agency.

(c) The review officer must be superior to the supervisor who proposed or approved the proposed action, and his decision must be based solely on the evidence before him which was made available to the recipient, with the exception for secrecy set forth above.

It is also Ordered, Adjudged And Decreed That:

3. Plaintiffs' complaints be deemed amended pursuant to their motion filed June 17, 1968.

4. The motion of the proposed intervenors to intervene as parties plaintiff is granted.

5. Plaintiffs' motion to dissolve the stay of discovery proceedings is denied.

6. Defendants' motion for summary judgment is denied.

7. Any issues relating to payment of retroactive benefits are reserved for further order of the court, upon application of plaintiffs on due notice to defendants if plaintiffs and defendants are unable to agree as to the disposition of such matters.

8. This order and every section thereof is stayed to and including the 30th day of December 1968, to allow defendants to take the necessary steps to obtain a further stay, if they seek it, from the Supreme Court.

Dated: New York, N. Y., December 13, 1968

Wilfred Feinberg
U. S. C. J.

Frederick v. P. Bryan
U. S. D. J.

Edward C. McLean
U. S. D. J.

Appendix D (1-4) Judgments of United States Court of Appeals (Escalera, Humphrey, Lockman, Rolle)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy.

Present: HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH, *Circuit Judges.*

Pedro Escalera, Rosa Escalera, and Annie Gallagher, etc.,
Plaintiffs-Appellants,

v.

New York City Housing Authority, Ira S. Robbins, individually and as a Member of the New York City Housing Authority, Simeon Golar, individually and as a Member of the New York City Housing Authority, and Albert A. Walsh, individually and as a Member and Chairman of the New York City Housing Authority,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

R. DAVID FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy.

Present: Hon. Harold R. Medina,
Hon. Sterry R. Waterman,
Hon. J. Joseph Smith, *Circuit Judges.*

Clarence Humphrey, Phyllis Humphrey, and Fannie Haywood, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

New York City Housing Authority, Ira S. Robbins, individually and in his capacity as a member of the New York City Housing Authority, and Francis V. Madigan, individually and in his capacity as a member of the New York City Housing Authority,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy.

Present: Hon. Harold R. Medina,
Hon. Sterry R. Waterman,
Hon. J. Joseph Smith, *Circuit Judges.*

Walter Lockman and Viola Lockman, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

v.

New York City Housing Authority and William Walsh, Ira S. Robbins, and Simeon Golar, individually and in their capacity as a member of the New York City Housing Authority,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

Clerk.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy.

Present: Hon. Harold R. Medina,
Hon. Sterry R. Waterman,
Hon. J. Joseph Smith, *Circuit Judges.*

Rose Lee Rolle, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

v.

New York City Housing Authority, Ira S. Robbins, individually and as a Member of the New York City Housing Authority, Simeon Golar, individually and as a Member of the New York City Housing Authority, and Albert A. Walsh, individually and as a Member and Chairman of the New York City Authority,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

Clerk.

Appendix E—New York City Housing Authority Resolution #60-8-684 Relating to Termination of Tenancy

RESOLUTION RELATING TO TERMINATION OF TENANCY

IT IS HEREBY RESOLVED BY THE MEMBERS OF THE NEW YORK CITY HOUSING AUTHORITY AS FOLLOWS:

ARTICLE I—INTRODUCTION

Section 1.01. Policy and Purpose. It is the purpose and intent of this resolution to establish the grounds upon which tenancies may be terminated in dwelling units in permanent projects of the Authority other than in off-site rehabilitated buildings, and to establish administrative machinery for the determination of whether grounds for such termination of tenancy exist which will safeguard dwelling tenants against arbitrary action and assure that only those tenants will continue occupancy who meet their rental obligations and the standards of eligibility fixed by law and by the resolutions and regulations of the Authority.

ARTICLE II—GROUNDS FOR TERMINATION

Section 2.01. As used in this resolution, the term "tenant" means the tenant or tenants who have signed the lease and, solely for the purposes of this Article II, includes any member of the family of the tenant and any other person occupying the premises.

Section 2.02. The following are the grounds upon which tenancy of a dwelling unit in a project operated by the Authority may be terminated:

a. *Non-Payment of Rent.* The default of the tenant to pay rent on the date fixed for the payment of rent in-

cluding any surcharges, whether current or retroactive, and other charges required to be paid pursuant to the tenant's lease and the regulations and resolutions of the Authority.

b. *Excess Income.* Annual income as defined by Authority regulation which exceeds the maximum income allowable by the regulations and resolutions of the Authority for continued occupancy of the dwelling unit occupied by the tenant.

c. *Misrepresentation.* The willful misstatement to or concealment from the Authority by the tenant of any material fact bearing upon or relating to any determinant of the tenant's eligibility for admission or continued occupancy or bearing upon or relating to the rent to be paid by the tenant.

d. *Breach of Rules and Regulations.* The violation by the tenant of any applicable rule, regulation or resolution of the Authority.

e. *Non-Cooperation.* The failure or refusal of the tenant to comply with the requirements or directives of the Authority or of the Manager of the project for the orderly, efficient and safe operation and management of the projects of the Authority or of the project in which the tenant resides.

f. *Chronic Delinquency in the Payment of Rent.* The repeated failure or refusal of the tenant to pay rent, when due.

g. *Non-Desirability.* Conduct or behavior of the tenant which violates the standard set forth in Section 2c of resolution entitled "Resolution Relating to Desirability as a Ground for Eligibility and Establishing Tenant Review Board", adopted June 25, 1953, as now in effect or as it may hereafter be amended.

h. *Non-Verifiable Income.* The failure, neglect or refusal of a tenant to furnish to the Authority verification satisfactory to the Authority of the income of the tenant, or to keep records of income and disbursements of or submit the same to an audit in accordance with the requirements and directives of the Authority.

i. *Assignment or Transfer of Possession.* The possession and use of a project apartment by a person or persons other than the tenant of record, without Authority permission or consent, after the tenant of record has moved from or no longer resides in the apartment.

j. *Residual Single Person Occupancy.* The possession of a project apartment by a single person who is the residual member of the family to which such apartment was assigned and who, under the regulations of the Authority, does not qualify to continue occupancy of the apartment.

Section 2.03. Other Grounds. Squatter proceedings, proceedings to evict persons or families based upon failure to vacate after giving notice to the Authority of intention to vacate or upon failure to physically occupy an apartment, proceedings which are instituted on any grounds against resident employees, and proceedings instituted on any grounds against tenants residing in site properties, shall be governed exclusively by the law applicable thereto. Such proceedings shall be commenced solely upon the authorization or direction of the Director of Management, or his designee, and no finding of ineligibility or compliance with other proceedings contained in this resolution shall be required preliminary to the institution and prosecution of summary proceedings on such grounds except as may be required by law. Termination proceedings against tenants residing in off-site reliabilitated buildings shall be governed by the requirements of Resolution 55-11-693, adopted November 9, 1955, as now in effect or as it may hereafter be amended.

Article III—Procedure For Termination of Tenancy and Eviction of Tenant

Section 3.01. Outline of Steps to be Taken.

a. Whenever it appears that a tenant is ineligible for continued occupancy upon a ground, other than Non-Payment of Rent, specified in Section 2.02, the Manager shall, before declaring the tenant ineligible, give the tenant an opportunity to appear at an interview before the Manager or person designated by the Manager. At such interview the tenant shall be informed of the grounds for the proposed action and shall be given an opportunity to present his side of the case. Unless the tenant fails to appear, the Manager shall make a determination as to whether the tenant is eligible or ineligible only after such interview. The determination by the Manager that the tenant is ineligible constitutes the Finding of Ineligibility, which is reviewable as hereinafter provided.

b. If the Manager determines that the tenant is ineligible on the grounds covered in paragraph c of this section, the tenant shall be given an opportunity to appeal to the Continued Occupancy Board. If the Manager determines that the tenant is ineligible on the grounds covered in paragraphs d and e of this section, the tenant, if he appeared at the interview referred to in paragraph a of this section, shall be given an opportunity to submit a written statement for consideration by the Tenant Review Board or the Reviewing Official.

c. *Excess Income and Misrepresentation.* If the tenant does not submit his appeal thereto within ten days after notification to him of the Finding of Ineligibility (hereinafter referred to as "Finding"), the Finding shall be final. If the tenant submits his appeal within such period of ten days, the Manager shall submit the complete folder of the tenant together with the report of the Manager

and the appeal of the tenant to the Continued Occupancy Board for review. If the Continued Occupancy Board disapproves the Finding, the tenant shall be restored to eligibility. If the Continued Occupancy Board approves the Finding, the Finding shall be final.

d. *Non-Desirability.* The Manager, after making the Finding, shall submit the complete folder of the tenant together with the report of the Manager and the written statement of the tenant, if any, to the Tenant Review Board for review. If the Tenant Review Board disapproves the Finding, the tenant shall be restored to eligibility. If the Tenant Review Board approves the Finding, the Finding shall be final.

e. *Breach of Rules and Regulations, Non-Cooperation, Chronic Delinquency in the Payment of Rent, Non-Verifiable Income, Assignment or Transfer of Possession, and Residual Single Person Occupancy.* The Manager, after making the Finding, shall submit the complete folder of the tenant together with the report of the Manager and the written statement of the tenant, if any, to the Director of Management, or the Deputy Director of Management, or the Assistant Director of Management for Housing Operations, or the Chief of a Housing Division in the Management Department (any one of whom is herein referred to as "Reviewing Official") for review. If a Reviewing Official disapproves the Finding, the tenant shall be restored to eligibility. If a Reviewing Official approves the Finding, the Finding shall be final.

Section 3.02. Non-Payment of Rent. Whenever any tenant of the Authority defaults in the payment of rent the Manager, after making all reasonable efforts to collect and after personal demand of the rent has been made or the alternative three days' notice in writing has been given, shall initiate summary proceedings to obtain a final order and to recover any rent still unpaid.

Section 3.03: Notice to Vacate.

a. Immediately upon the Finding of Ineligibility becoming final, the Manager shall serve a Notice to Vacate upon the tenant.

b. Each Notice to Vacate shall expire on the last day of a calendar month.

c. The period of notice shall be as follows:

For Excess Income—3 months;

For all other grounds except Non-Payment of Rent—1 month.

Section 3.04: Summary Proceedings. Upon expiration of the Notice to Vacate, the Manager shall immediately institute summary proceedings for the eviction of the tenant unless deferment or withdrawal of such proceedings has been authorized pursuant to this resolution.

Article IV—Powers and Duties

Section 4.01. Manager.

a. The Manager shall have the following powers and duties which may be exercised either personally by him or by such personnel as he may assign thereto:

(1) Upon failure of the tenant to pay the rent when due, to make demand for the rent or serve the alternative three days' notice in writing, except that the Manager may defer the same for not more than ten days if circumstances exist which in his opinion, make it advisable, or with the approval of the Director of Management or his designee the Manager may defer the same for more than ten days; to institute summary proceedings upon failure of the tenant to pay pursuant to such demand or notice.

(2) To comply promptly with all requirements as to furnishing of the record and the giving of any notice; to

execute notices to vacate and petitions in summary proceedings; to execute and deliver on behalf of the Authority, without any further authorization, all notices, demands, and any other instruments relating to or necessary for the commencement and prosecution of summary proceedings.

b. The Manager shall have the power, in any case in which circumstances warrant such action, to defer the service of a Notice to Vacate and extend the expiration date of a Notice to Vacate or a stay after final order, and to revoke or withdraw termination proceedings at any stage, whether before or after final order has been obtained but prior to actual eviction of the tenant, subject to such requirements as may be authorized with respect thereto by regulations approved by the Chairman or General Manager.

c. As used in this resolution, the term "Manager" means the Manager of the project in which the tenant resides or any employee of the Authority authorized to act for the Manager in his absence.

Section 4.02. Director of Management.

a. The Director of Management may, upon approval of the Chairman or General Manager, delegate any powers granted to him under this resolution.

b. The Director of Management may make appropriate provision in his discretion allocating among the Chiefs of the Housing Divisions in the Management Department in cases specified in Section 3.01 e of this resolution the function of reviewing Findings of Ineligibility. Notwithstanding the foregoing, the power of each Housing Division Chief to pass upon any such Findings shall not thereby be in any way modified, limited, or impaired, and the review and determination of any such Finding by any Housing Division Chief shall constitute a final and binding determination thereon.

c. In addition to any powers granted to the Director of Management by this resolution, the Director of Management shall have all the powers granted to the Manager by Section 4.01 of this resolution and any other powers that may be necessary for termination of tenancy of any tenant or the eviction of any occupant and the institution of summary proceedings, to be exercised by the Director of Management in his sole discretion.

Section 4.03. Chairman and General Manager. The chairman or the General Manager of the Authority is hereby authorized to establish such procedures, approve such forms, fix such notice and service requirements and promulgate and establish such other rules, regulations, forms and procedures not inconsistent herewith as may be necessary to effectuate this resolution. The Chairman or General Manager is further authorized, in connection with termination of dwelling tenancy proceedings, to assign such functions and to grant such additional powers to the Continued Occupancy Board and to other officers and employees of the Authority, as he may deem desirable and as are not inconsistent with this resolution.

Article V—Rents

Section 5.01. Retroactive Rent Surcharges.

a. If a tenant fails to report income or other information or a change in income as required by the rules, regulations and resolutions of the Authority, or misstates, misrepresents or conceals his correct income or any determinant of his eligibility for occupancy or any determinant of the rent to be paid, he shall be required, upon discovery thereof by the Authority, to pay retroactive rent surcharges for the period involved equal to the difference between the rent the tenant should have paid, had the correct income or other information been reported to the Authority at the time required, and the rent actually paid by

the tenant. If the income of the tenant is non-verifiable or if the Authority is unable to satisfactorily ascertain the correct income of the tenant, the tenant shall be required to pay retroactive rent surcharges for the period involved equal to the difference between the maximum rent for the apartment and the actual rent paid by the tenant.

b. Such retroactive rent surcharges shall be added to the rent next due or due in any subsequent month as additional rent, and for failure to pay such additional rent as well as the current monthly rent non-payment summary proceedings shall be instituted by the Manager except as otherwise authorized by appropriate directive or procedure.

c. Any payment of retroactive rent by the tenant and acceptance thereof by the Authority shall not affect or modify any requirements of the Authority for the termination of the lease of the tenant on the ground of Misrepresentation, Non-Verifiable Income or any other authorized ground.

Section 5.02. Maximum Rents to be Charged. Notwithstanding the provisions of any other resolution of the Authority, if the income of the tenant is non-verifiable or if the Authority is unable to satisfactorily ascertain the correct income of the tenant, in addition to being required to pay retroactive rent surcharges as provided in Section 5.01 hereof the tenant shall also be required to pay prospectively the maximum rent established for the apartment occupied by such tenant.

Article VI—Resolutions Repealed and Effective Date

Section 6.01. Resolutions Repealed. Resolution 957, adopted August 25, 1943; 49-7-491, adopted July 14, 1949; 53-3-185, adopted March 12, 1953; 53-6-418, adopted June 25, 1953; 53-8-476, adopted August 13, 1953; and 54-8-518,

adopted August 19, 1954, are hereby repealed. The repeal of such resolutions shall not be deemed to impair, abate, or invalidate any determinations, proceedings, or any other acts made, undertaken or performed under or by virtue of such resolutions; any proceedings or actions now pending under such resolutions may be continued and completed as though such resolutions were not repealed but continued to be fully effective.

Section 6:02. Effective Date. This resolution shall take effect immediately.

Appendix F—New York City Housing Authority Resolution No. 62-9-683 Relating to Desirability as a Ground for Eligibility

RESOLUTION RELATING TO DESIRABILITY AS A GROUND FOR ELIGIBILITY

IT IS HEREBY RESOLVED BY THE MEMBERS OF THE NEW YORK CITY HOUSING AUTHORITY AS FOLLOWS:

Section 1. *Policy.* It is the established policy of the Authority to create an environment for families living in its projects conducive to healthful living, family stability, sound family and community relations, good citizenship, and proper upbringing of children. The occupancy of Authority projects by families whose conduct and behavior, family life, lack of parental control over children, and ways of living create influences and effects that are adverse and detrimental to other families in the project or the entire community, seriously interferes with the objectives of the Authority for wholesome family and community life, frequently constitutes a danger to the health, safety, or morals of their neighbors, may be a cause of damage to the property of the Authority of its projects. The Authority therefore deems it necessary, in order to effectuate the policy herein set forth and provide procedural safeguards for the protection of families to whom this resolution may apply, to establish the following controls.

Section 2. *Ground for Eligibility.* It shall be a ground for eligibility for admission to or continued occupancy in any Authority project, that the tenant or applicant is or will be a desirable tenant. The standard to be used in approving eligibility for admission or continued occupancy of a family shall be that the family will not or does not constitute (1) a detriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence

upon sound family and community life, (3) a source of danger to the peaceful occupation of the other tenants, (4) a source of danger or cause of damage to the premises or property of the Authority, or (5) a nuisance. In making such determination, consideration shall be given to the family composition, parental control over children, family stability, medical and other past history, reputation, conduct and behavior, criminal record if any, occupation of wage earners, and any other data or information with respect to the family that has a bearing upon its desirability, including its conduct or behavior while residing in a project. Any applicant or tenant determined to be ineligible by virtue of the standard herein set forth shall be declared to be ineligible on the ground of Non-Desirability.

Section 3. *Tenant Review Board.*

a. *Establishment.* There is hereby established a Board of the Authority to be known as the Tenant Review Board.

b. *Organization.* The Board shall consist of the following eight members:

(1) A Member of the Authority, designated by the Chairman, who shall act as chairman of the Board;

(2) A representative of the Management Department, designated by the Director of Management;

(3) A representative of the Legal Department, designated by Counsel;

(4) A representative of the Intergroup Relations Office, designated by the Director of Race Relations;

(5) A representative of the Social and Community Services Department, designated by the Director of Social and Community Services;

(6) and (7) Two Housing Managers, designated by the Director of Management;

(8) The administrator of the Board, (hereinafter referred to as "Administrator"), to be appointed by the Chairman of the Authority, who shall act as chairman in the absence of the chairman of the Board.

c. *Meetings and Mode of Action:* The Board shall meet at the oral or written call of the chairman or the Administrator at such time and place as may be fixed by him. A quorum shall consist of five members. The decision of the majority of the members present at a meeting, or of the majority of a panel, as provided in and subject to Section 4b hereof, shall be deemed the decision and final determination of the Board.

Section 4. *Jurisdiction and Powers of Tenant Review Board.*

a. The Board shall review such cases involving non-desirability of applicants as may be required to be submitted to the Board by appropriate rules and procedures, and make a final determination thereon.

b. The Board shall review all cases involving non-desirability of tenants and make a final determination thereon. Before a final determination of ineligibility is made, the tenant shall be afforded an opportunity to appear personally, with counsel or any representative of his own choosing, before a panel consisting of two or more members of the Board, to be designated by the Chairman of the Board. The determination of a majority of such panel shall constitute the decision of the Board and shall be final, unless the Chairman of the Board remands the case to the Board, in which case the decision and final determination shall be made by the Board. If there is no majority decision, the case shall be remanded to the Board which shall render the decision and final determination thereon.

c. *Rules and Procedures.* Rules and procedures that may be issued to implement the standard contained in Sec-

tion 2 hereof may, in addition to any other matter therein contained, provide for the information to be obtained by the tenant selection staff of the Authority with respect to applicants, and by the management staff of the projects with respect to tenants, to provide a basis upon which a determination may be made as to whether an applicant or a tenant is desirable or non-desirable. Such rules and procedures shall, whenever practicable, contain appropriate delegations of authority, upon which final determinations may be made by designated employees of eligibility or ineligibility of applicants.

Section 5. *Procedure for Termination of Tenancy.*

Whenever it appears that a tenant of the Authority is ineligible for continued occupancy on the ground of Non-Desirability, the following steps shall be taken:

a. The Manager shall submit the complete folder of the tenant together with his report and recommendation to the Tenant Review Board.

b. The Tenant Review Board shall review each matter submitted to it at a regular meeting. It shall make such inquiry and disposition with respect thereto as it may deem appropriate; and shall, whenever warranted by the record, refer a matter for final determination to a panel of the Board, as provided in Section 4b hereof.

c. The panel shall not be bound by the technical rules of evidence or procedure, and a verbatim transcript shall not be required. The panel may require, in its discretion, any person appearing before it to testify under oath, which shall be administered by any member of the panel. The panel may grant adjournments and amendments and may at any time for any purpose refer the matter back to the Board. The Chairman of the Board shall have the power to issue subpoenas.

d. All decisions of the Board shall be executed by the Charman of the Board, who shall provide for notice to the

tenant and the Manager in those cases in which a determination of ineligibility has been made.

e. Upon receipt of a final determination that the tenant is ineligible, the Manager shall serve a one month notice to vacate upon the tenant which shall expire on the last day of a calendar month. Upon expiration of the notice to vacate, the Manager shall immediately institute summary proceedings for the eviction of the tenant.

Section 6. Resolution 53-6-417, adopted June 25, 1953, and Resolution 60-1-43, adopted January 20, 1960, are hereby superseded by this resolution.

Section 7. This resolution shall take effect immediately, except that it shall not apply to any cases in which the Tenant Review Board, on or before September 14, 1962, approved a finding of ineligibilty on the ground of Non-Desirability, in which cases the resolutions in effect prior to the date of the adoption of this resolution shall apply. Except as hereinabove provided in this Section 7, the provisions of this resolution shall not be deemed to affect or impair the validity of any act or action heretofore or hereafter performed or taken under the resolutions repealed by Section 6 hereof.

Appendix G—New York City Housing Authority—Management Manual Chapter VII, Termination of Tenancy—Table of Contents, pp. 1-5, Text, pp. 1-7; Appendix B, Tenant Review Board Handbook, Title Page, pp. 4-6, 15-17, 19-27, 29

NEW YORK CITY HOUSING AUTHORITY

MANAGEMENT MANUAL

CHAPTER VII PAGE 1

TERMINATION OF TENANCY

I. INTRODUCTION

A. Contents of Chapter

This chapter concerns termination of residential tenancy in projects. It does not include sites or rehabilitated apartments. It discusses the grounds for termination of tenancy, the internal procedure to be followed in accordance with Authority policy, the legal requirements for formal court action, the records to be kept, and the reports required for termination of tenancy.

This chapter deals exclusively with the legal and administrative procedural steps in terminating tenancy. This chapter is not concerned with the standards and methods to be applied in determining the eligibility or ineligibility of the tenant, which is preliminary to the procedural steps referred to above. The eligibility standards are to be found in other chapters of the Management Manual. Where necessary, reference will be made to the appropriate section of these chapters.

B. References

Termination of Tenancy is based upon the following Authority Resolutions:

60–8–685—Relating to Continued Occupancy Board

53–6–417—Relating to Desirability and Establishing Tenant Review Board (as amended by 60–1–43)

60–8–684—Relating to Termination of Tenancy

Termination of tenancy is also subject to the requirements of any state or local laws with respect to termination of tenancy and the commencement and prosecution of Summary Proceedings, and to provisions contained in the contracts of the Authority with lending agencies. The Authority is exempt from the New York State Emergency Housing Rent Control Law and from the Rules and Regulations promulgated thereunder.

C. Strict Compliance Essential

It is essential that there be strict adherence to all requirements set forth in this chapter. When the termination proceeding reaches the stage of Summary Proceedings and comes up for trial, it may be necessary to prove that tenancy has been terminated on a ground or grounds established by the Authority and that all statutory requirements have been followed.

III. Termination by Authority—Action Prior to Legal Proceedings

A. List of Grounds

Following are the grounds upon which a tenancy may be terminated:

Grounds Requiring a Finding of Ineligibility

1. Misrepresentation } Reviewed by Continued
2. Excess Income } Occupancy Board
3. Non-desirability—Reviewed by Tenant Review Board
4. Breach of Rules and Regulations
5. Non-cooperation
6. Chronic Delinquency in the Payment of Rent
7. Non-verifiable Income
8. Residual Single Person Occupancy
9. Assignment or Transfer of Possession

} Reviewed by Reviewing Official

Grounds Which Do Not Require a Finding of Ineligibility

10. Failure to Physically Occupy an Apartment—(Legal action must be authorized by the Director of Management)
11. Failure to Vacate After Giving Notice to the Authority of Intent to Vacate

12. Police (Contingent) Liability

13. Termination of Tenancy of Resident Employe

In addition, this chapter deals with the legal procedure for Termination of Tenancy for Non-payment of Rent.

B. Selection of Grounds

The grounds for termination of tenancy must be carefully selected at the inception of the proceedings, as otherwise the validity of all subsequent steps may well be endangered. Although a tenant may be declared ineligible on more than one ground, it is advisable to proceed on the one ground which appears to be strongest. However, where it appears desirable to declare a tenant ineligible on more than one ground, this is to be done only where the grounds to be used require identical methods of handling. For example, a tenant may be declared ineligible for Misrepresentation and Excess Income at the same time, since both are reviewable by the Continued Occupancy Board, or Breach of Rules and Regulations and Non-co-operation since both require the approval of the Reviewing Official (i.e., Director of Management, Deputy Director of Management, Assistant Director of Management for Housing Operations, Chief Manager or anyone temporarily acting in that capacity). However, a tenant is not to be declared ineligible on two grounds at the same time where one ground requires approval by the Reviewing Official or the Tenant Review Board and the other is reviewable by the Continued Occupancy Board.

Likewise, a tenant is not to be declared ineligible on two grounds where one ground requires approval by the Tenant Review Board and the other requires the Reviewing Official's approval. If there is any question as to the grounds to be selected the Manager shall consult the Chief Manager.

C. Preliminary Procedure Prior to Finding of Ineligibility

1. It is important that the Manager recognize his responsibiilty to prevent the development of conditions leading to termination of tenancy and eviction of the tenant. Accordingly, the Manager should make every effort through discussions with the tenant and through referrals to Social Agencies to correct situations before they develop to a stage where there is no alternative but to institute termination proceedings. In addition to discussions with the tenant the Manager is required to give the tenant a warning in writing to correct the conditions complained of. This written notice is intended to give the tenant a final opportunity to take corrective action to forestall the necessity for termination proceedings. Such a written notice is not however required in a case where the situation does not lend itself to corrective action, such as Misrepresentation, Excess Income, Assignment or Transfer of Possession, or Residual Single Person Occupancy, or where the act committed, constituting Non-Desirability, is so gross or irreparable that in the judgment of the Manager termination proceedings must be instituted without

any delay, notwithstanding that it is based upon a single incident.

2. At the point where despite previous discussions, written notices and other remedial action taken, a Manager believes termination proceedings should be initiated against a tenant, the tenant is to be called in for an interview and given a reasonable opportunity to state his case before the Finding of Ineligibility is made. At this interview an itemized summary of the various incidents or facts contained in the tenant's folder upon which the proposed action is based is to be made known to the tenant, and the tenant should then be given an opportunity to reply. If the tenant desires additional time to enable him to furnish further information in reply, the interview may be adjourned for a reasonable time.

In all cases other than Excess Income, the interview is to be conducted by the Manager or Assistant Manager only. In Excess Income cases, the interview may be conducted by the Housing Assistant.

A summary of the interview is to be recorded in the tenant's folder, including a complete summary of the tenant's reply or explanation, if any. In addition, the record should indicate the attitude of the tenant toward the situation involved, his apparent recognition or non-recognition of the problem, and particularly whether the tenant indicates a responsibility toward resolving the particular problem or problems involved.

D. Termination of Tenancy Interview

1. Request for Tenant to Appear for Termination Interview

The initial step in Holdover Termination for grounds listed in items 1 through 9 in Section III a above, is a letter to the tenant that termination of tenancy is being considered and requesting the tenant to appear for an interview. A series of form letters has been prepared for the entire termination process. The letters must name and be addressed to each tenant of record. A copy of each such letter is to be retained in the tenant folder.

a. First Call-in Letter—(All Grounds) (Form 040.185)

This letter shall be used in requesting the tenant to appear for the interview for all grounds. The letter advises the tenant that termination of tenancy is being considered. The termination interview shall be scheduled to allow the tenant at least 5 business days advance notice. A reasonable postponement of the interview should be granted if the tenant indicates an inability to appear on the date specified.

b. Follow-up Letter—(All Grounds *Except* Excess Income and Misrepresentation) (Form 040.186)

This form shall be used in cases where the tenant has failed to respond to the First Call-in Letter, for grounds other than Excess Income or Misrepresentation. It gives the tenant a final opportunity to appear for the termination interview. It also advises the tenant that failure to appear will result

in a recommendation that legal action be initiated to terminate tenancy.

c. Letter Notifying Tenant of Manager's Recommendation for Termination—(All Grounds *Except* Excess Income and Misrepresentation) (Form 040.187)

This form is used in cases where the tenant has appeared for the termination interview for all grounds other than Excess Income or Misrepresentation. The letter notifies the tenant of the Manager's recommendation to terminate tenancy and advises the tenant that he may submit, within 10 days of the date of the letter, a statement in writing of the facts which in his opinion entitle him to remain in occupancy.

d. Follow-up Letter Containing Copy of 040.020B (Excess Income and Misrepresentation *only*) (Form 040.188.)

This form is used only where the tenant has the right to appeal to the Continued Occupancy Board to review the Manager's Finding of Ineligibility, i.e., Excess Income and Misrepresentation. The specific ground or grounds are to be inserted in the appropriate space of this letter. (Where more than one ground is to be indicated, see Selection of Grounds, Section III B.)

Form 040.188 advises the tenant of the Manager's Finding of Ineligibility by reason of the tenant's failure to respond to the First Call-in Letter. The tenant is informed of the reasons for the Finding of Ineligibility on a completed copy of Tenant Data For Continued Occupancy Board

(Form 040.020B) and that if he wishes to appeal to the Continued Occupancy Board his request for review must be submitted to the project office within 10 days.

2. Interview with Tenant

The termination interview with the tenant shall be conducted in accordance with the detailed instructions contained in Section III C 2, above. It is extremely important that particular attention be given to the following in connection with the termination interview.

a. All the incidents or facts upon which the manager may rely in recommending the proposed termination of tenancy action must be made known to the tenant. The source of this information, however, need not be identified.

b. The tenant must be given an opportunity to give his side of the story and informed that he may submit any statement or document deemed necessary.

c. A detailed summary of the termination interview must be recorded in the tenant's folder which shall consist of a statement of the facts cited to the tenant, the tenant's reply or explanation, and the tenant's attitude.

3. Manager's Recommendation to Terminate Tenancy

A recommendation to terminate tenancy may be made only after the termination interview with the tenant, or after the project has been unable to complete the termination interview because of the tenant's failure or refusal to reply or be interviewed.

a. All Grounds Other Than Excess Income and Misrepresentation

(1) If, prior to the close of the interview with the tenant, the Manager has reached a decision to recommend to Central Office that termination action be taken, the tenant shall be informed of the steps involved in the termination procedure. He shall also be advised of his right to submit a statement in writing within 10 days, giving his side of the case and the facts which in his opinion, entitled him to remain as a tenant. It shall be made clear to the tenant that his statement, together with the entire record will be forwarded for review by a Reviewing Official or Board. In all cases where termination of tenancy is decided upon, the Manager shall record and sign the following statement to be entered in the tenant folder:

> "Recommendation for termination of tenancy is being made because of (specify ground(s)) —Form 040.187 served on tenant".

(2) If the recommendation to terminate tenancy is made after the completion of the interview with the tenant, the Manager shall record and sign the following statement to be entered in the tenant folder:

> "Recommendation for termination of tenancy is being made because of (specify ground(s))

—Form 040.187 mailed to tenant".

(3) In cases where the tenant fails or refuses to appear for an interview, the Manager shall record and sign the following statement to be entered in the tenant folder:

"Recommendation for termination of tenancy is being made because of (specify ground(s)) —tenant failed to appear for interview". The entry shall also contain the details of the efforts to contact the tenant, such as the letters sent to the tenant requesting that he appear for an interview, copies of which must be filed in the tenant folder.

b. Excess Income and Misrepresentation

(1) If, prior to the close of the interview with the tenant, it is decided to initiate termination of tenancy action, the tenant shall be informed of the steps involved in the termination procedure. The tenant shall be advised of his right to appeal to the Continued Occupancy Board. One completed copy of Tenant Data for Continued Occupancy Board (Form 040.020B) shall be given to the tenant at the time of the interview together with Tenant's Request for Review by Continued Occupancy Board (Form 040.020A). The Tenant shall be advised that if he wishes to appeal to the Board, the Tenant's Request for Review by Continued Occupancy Board

(Form 040.020A) must be submitted to the project office within 10 days. The following signed entry shall be recorded in the tenant's folder:

> "Tenant ineligible because of (specify ground(s))—Form 040.-020B given to tenant".

(2) In cases where the tenant fails or refuses to appear for the interview, a signed entry shall be made in the tenant folder as follows:

> "Tenant ineligible because of (specify ground(s))—tenant failed to appear for interview. Form 040.188 mailed to tenant together with completed copy of Tenant Data for Continued Occupancy Board (Form 040.-020B."

E. Manager's Finding of Ineligibility

1. All grounds Other Than Excess Income and Misrepresentation (See Grounds 3 through 9, Section III A)

The entire record of the tenant, including the tenant folder, Request for Permission to Issue Notice to Vacate (Form 040.101), together with any statement which the tenant may have submitted to the Manager, shall be forwarded to Central Office for review as detailed in Sections III H and I below. The Request for Permission to Issue Notice to Vacate, signed by the Manager, constitutes the Manager's Finding of Ineligibility.

2. Excess Income and Misrepresentation

a. In cases where the tenant requests review by the Continued Occupancy Board, the entire record of the tenant which shall consist of the tenant folder, completed copies of Tenant Data for Continued Occupancy Board (Form 040.020B), Tenant's Request for Review by Continued Occupancy Board (Form 040.020A), any other statement the tenant may have submitted to the Manager, and the Manager's recommendation, shall be forwarded to Central Office for review by the Continued Occupancy Board. The Manager's Recommendation on Tenant's Data for Continued Occupancy Board (Form 040.020B) constitutes the Manager's Finding of Ineligibility.

b. In cases where the tenant has failed to appear for an interview, or has failed to file a written appeal for review by the Continued Occupancy Board within the 10-day period, the Manager shall initiate termination of tenancy proceedings by the service of a Notice to Vacate upon the tenant in accordance with Section IV, below. In such cases the completed Tenant Data for Continued Occupancy Board (Form 040.-020B) shall constitute the Manager's Finding of Ineligibility.

3. Notification to Tenant of Final Determination After a case has been reviewed by a Reviewing Official or appropriate Board, the Manager shall be immediately notified of the determination. Where the determination disapproves the Manager's Finding of Ineligibility, the tenant shall be informed of the restoration to eligibility.

Tenant Review Board Handbook

(A Guide To The Processing Of Termination Of Tenancy Actions On The Ground Of Non-Desirability)

I. Policy Statement—Non-Desirability as a Ground for Termination of Tenancy

The policy of the Authority is to create for its tenants an environment conducive to healthful living, family stability, sound family and community relations and proper upbringing of children.

In order to effectuate this policy and to provide safeguards against arbitrary action in terminating tenancies, a family shall be continued in occupancy when, in the light of its conduct while residing in the project, it does not constitute *a detriment to health, safety or morals of its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or a cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants, or a nuisance.*

Action to terminate the tenancy of a family is to be used only as a last resort and where it appears that resolution of the problem cannot be effectuated within a reasonable period of time. Occupancy will be terminated only because the behavior is seriously damaging to neighbors or to the housing development and not as a means of punishment.

The application of the Authority's policies by a Manager or by the Tenant Review Board is to be as flexible as possible consistent with the policy of the Authority to create the above described environment. Responsibility for the initial recommendation of eligibility or ineligibility of a tenant, within the policy

and standards set by the Authority, rests with the Manager. Final determination on the ground of Non-desirability rests with the Tenant Review Board.

Each tenant is to be given an opportunity to discuss the problem with the Manager or Assistant Manager before a decision is made to submit the tenant's record for consideration by the Tenant Review Board. A tenant may not be found ineligible by the Tenant Review Board until he has been afforded an opportunity to present his case in person before a panel of the Tenant Review Board.

II. The Tenant Review Board

A. Jurisdiction of the Board

The Tenant Review Board is responsible for determining the eligibility for admission to or continued occupancy in Authority projects of applicants and tenants where factors of desirability are involved, in accordance with rules and procedures established by the Authority. (This Handbook deals with the operation of the Board solely with respect to termination of tenancy; it does not deal with the admission of applicants to Authority projects.)

B. Composition of the Board

The Tenant Review Board consists of the following eight members:

1. A member of the Authority, designated by the Chairman of the Authority, who shall act as Chairman of the Board;

2. A representative of the Management Department, designated by the Director of Management;

3. A representative of the Legal Department, designated by Counsel;

4. A representative of the Intergroup Relations Office, designated by the Director of Intergroup Relations;

5. A representative of the Social and Community Services Department, designated by the Director of Social and Community Services;

6. and 7. Two Housing Managers, designated by the Director of Management;

8. The Administrator of the Board, to be appointed by the Chairman of the Authority, who shall act as Chairman of the Board in the absence of the regularly designated Chairman.

The two Housing Managers (T.R.B. members 6. and 7., above) are chosen on a rotating basis from among the Housing Divisions of the Management Department. Service on the Board by individual Managers is limited to approximately four months.

Alternate members of the Tenant Review Board may be designated to serve on the Tenant Review Board to meet the special needs of the Board. Such designations are made in the same manner as indicated above. An alternate member of the Board serves only in the absence of, or in the place of, the regularly designated member.

C. Meetings and Mode of Action

The Board meets at the oral or written call of the Chairman or the Administrator of the Board at such time and place as may be fixed by him. A quorum of the Board consists of five members. Before a final determination of ineligibility is

made, a tenant must be afforded an opportunity to appear in person before a panel of the Board. A panel of the Board consists of two or more Board members, designated by the Chairman of the Board. The decision of the majority of the members present at a meeting, or of the majority of a panel of the Board, is deemed to be the decision and final determination of the Board. (See Section VII., A. 8. of the Tenant Review Board Handbook for Tenant Review Board Processing of Cases.)

III. Role of the Social Services Division

The Social Services Division is utilized in evaluating problem families and in assisting the Tenant Review Board to make decisions relating to termination of tenancy. To the extent that the size of its staff permits, the Social Services Division also will be concerned with families when problems first begin to appear. One of the functions of the social work staff is to determine what type of help families need and to find an established public or private agency capable of furnishing the required assistance.

Cases intended for study by the Social Services Division are to be forwarded to the Tenant Review Board for referral to the Social Services Division. (See Sec. VII. A. 4., for the method of preparing cases for submission to the Tenant Review Board.)

Reports prepared by the Social Services Division, as a result of its study of families, are to be considered part of the documentation and factual material upon which Managers and the Tenant Review Board are to base their recommendations and decisions as to eligibility. In reviewing such reports, it should be understood that the recommendations of the Social Services Division are merely advisory in nature.

The decisions of the Tenant Review Board are based on an over-all review of the information available to it, including the tenant's folder and any supporting material submitted by the Manager, the Social Services Division report, as well as additional information obtained from other sources by the Board.

Copies of confidential Social Services Division reports will be forwarded to the projects concerned. Such reports are intended solely for the Manager's use. The contents of the reports are not to be revealed to others. Social Services Division reports are to be retained by the Manager in a special confidential file; under no circumstances are such reports to be filed in tenants' folders. However, upon receipt of a Social Services Division report, the Manager is to make the following entry in the tenant's folder: "Confidential Social Services Division report received. Report filed in Manager's confidential file."

6. Problem Behavior of Elderly Persons

While the behavior of an elderly person may be of the character described as a clear and present danger or as disruptive behavior, the causes for this behavior and the needs of the elderly person for possible institutional care or other special assistance requires special consideration.

Cases involving the problem behavior of elderly persons shall not be processed on the ground of non-desirability without prior submission of the case to the Tenant Review Board for evaluation by the Social Service Division. The Manager shall take the evaluation into consideration in making his recommendation as to eligibility.

V. Documentation of Tenant Cases

Managers shall conduct complete and responsible investigations and shall fully document their findings in tenant folders. All sources of information and investigation must be utilized, including the specialized skills such as are available through the Security Division, the Social Services Division and the staff of the Tenant Review Board. In addition, Managers are responsible for seeking out and establishing liaison with project and community agencies and organizations, as well as with the various courts, correctional agencies, and parole and probation departments.

A. Tenant Folder Entries

1. All entries in tenant folders shall be legible, clear and complete.
2. Entries shall indicate the source of information.
3. All persons mentioned in such entries shall be clearly identified by name. This includes mem-

bers of the tenant's family, persons making complaints, as well as employes who may be involved.

4. Copies of reports by Housing Officers, Guards, etc., or extracts of pertinent sections thereof, shall be incorporated in the tenant folder.

5. All interviews or discussions with tenants, which are pertinent in evaluating the record of tenancy, shall be recorded in detail. It is important that such entries reflect the tenant's attitude and the degree of cooperation.

6. Detailed information shall be given of the nature and cause of any arrest, incident, offense, violation or other act of non-desirable behavior recorded in the tenant folder.

   a. Reports of loitering shall give a full description of what occurred. Was the loiterer loud, abusive or threatening? Did the act of loitering substantially interfere with the comfort of other tenants or with project operations?

   b. Similarly, reports of unacceptable housekeeping cannot be properly evaluated unless the reports reflect the specific conditions noted at the time of apartment inspection. Entries such as "Bad housekeeping," or "Apartment in horrible condition," or "No improvement since last inspection" are not adequate, since they do not spell out the details of the condition of the apartment. (See Section IV. B. 7. for the applicable standards.)

B. Follow-Up Investigations and Reports

It is the Manager's responsibility to initiate follow-up investigations and reports which are neces-

sary for the proper documentation of a case. The following are examples of areas requiring follow-up investigation:

1. Uncorroborated complaints or reports of tenant misbehavior must be investigated by project staff and documented to the extent possible. In special situations, where the investigation is beyond the means of the project staff, request for assistance shall be made to the Security Division.

2. Reports of "poor housekeeping" by exterminators or other maintenance personnel require follow-up investigation by a member of the management staff. A detailed record of the conditions observed at the time of such visit shall be entered in the tenant folder. In addition, any plan for corrective action and follow-up visits shall also be noted.

3. The Security Division receives teletype reports of current arrests. It identifies all arrests of project residents which were made by other authorities, such as the N.Y.C. Police Department, the Transit Police, the F.B.I., etc. Pertinent identifying information is then forwarded to the Manager of the project concerned. Upon receipt of such information, it is the Manager's responsibility to obtain details of the arrest through interviews with the tenant and through contacts with the arresting officer, the appropriate court or investigating probation officer. The Security Division is not in a postion to service projects by obtaining additional information or the court disposition of such arrests.

The legal procedure—commencing with the service of the Notice to Vacate and covering the steps up to and including the Judgment of Possession;*

The administrative and legal procedure following the Judgment of Possession*—including extensions, restoration to eligibility and eviction.

*(The term Judgment of Possession, which represents the decision of the Court in a Hold-over Proceeding, supplants the term Final Order. Wherever the term Final Order appears, such as in manuals, procedures and forms, it shall be deemed to refer to Judgment of Possession.)

A. Preliminary Administrative Procedure

Managers shall be guided in the initiation of termination of tenancy by the standards and criteria detailed previously in Section IV. Normally, a recommendation to terminate tenancy shall not be made in cases which solely involve disruptive behavior unless there is a record of repeated behavior of this type, and unless the tenant has been given an opportunity to take corrective action.

1. Termination of Tenancy Interview

At the point where the Manager is considering termination proceedings against a tenant, the tenant is to be requested to appear for interview at the Management Office. The purpose of this interview is to review with the tenant the last incident or incidents which are the cause for concern. Previous incidents will, of course, have been discussed with the tenant

as they occurred. The interview will give the tenant an opportunity to state his case at a face-to-face meeting with the Manager or Assistant Manager. It will also provide an opportunity for the Manager, in making his evaluation and recommendation, to take into consideration the tenant's attitude, cooperation, and efforts to take remedial action.

a. Tenant Call-in Letter—(Form 040.185A).

The Tenant is to be requested to appear for interview at the Management Office through the use of form letter 040.185A (Tenant Call-in Letter—Non-Desirability). The letter is to be prepared in duplicate and is to name and be addressed to the tenant. The appointment interview shall be scheduled to allow the tenant at least 5 business days advance notice. A reasonable postponement should be granted if the tenant indicates an inability to appear on the date specified. A copy of the letter is to be retained in the tenant folder.

b. Follow-up Letter—(Form 040.185A with Postscript)

If the tenant fails to respond to the call-in letter, a second letter is to be sent to the tenant, again using form letter 040.185A, but setting a new appointment date, providing at least 5 days advance notice. However, the following postscript shall be typed in the lower section of the letter:

> "P.S. You failed to respond to our previous appointment letter. This is a final appointment notice."

A copy of this letter shall also be retained in the tenant folder.

c. Interview with Tenant

The interview with the tenant shall be conducted by the Manager or Assistant Manager only. The most recent incident or incidents should be discussed with the tenant in relation to the total record of tenancy. The tenant must be afforded an opportunity to give his side of the story and to submit any statement or document he deems necessary. If the tenant desires additional time to submit documentation or for other valid reasons, the interview may be adjourned for a reasonable time.

A detailed summary of the interview is to be recorded in the tenant's folder. The summary shall contain a statement of the facts cited to the tenant and the tenant's reply or explanation, if any. In addition, the record should indicate the attitude of the tenant toward the situation involved, his apparent recognition or non-recognition of the problem, and particularly whether the tenant indicates a responsibility toward resolving the particular problem or problems which constitute the basis for Management's concern.

2. Manager's Recommendation

A recommendation to terminate tenancy, or to take other appropriate action, may be made by the Manager only after the termination interview with the tenant. If the project has been unable to conduct an interview because of the

tenant's failure or refusal to be interviewed, then, of course, the recommendation shall be made without an interview.

3. Notification to Tenant of Manager's Recommendation

a. If, at the close of the interview with the tenant, the Manager has reached a decision to recommend termination of tenancy, the tenant shall be so notified. It shall be made clear to the tenant that the entire tenant record, including any statement or documentation which the tenant may have submitted to the Manager, will be forwarded for consideration and decision by the Tenant Review Board. The tenant shall also be informed that he will be given an opportunity at a later date to appear in person before a panel of the Tenant Review Board prior to a final decision concerning termination of his lease. The tenant shall then be given a copy of form letter 040.187A (Letter Notifying Tenant of Manager's Recommendation to Terminate). This letter confirms the Manager's recommendation to terminate tenancy and repeats the above information concerning the submission of the case to the Central Office and the tenant's opportunity to appear in person to present his side of the story before a final decision is made. A copy of this letter is to be retained in the tenant folder.

b. In the event that the Manager's decision to recommend termination of tenancy is made after the completion of the interview with the tenant, or if the tenant fails or refuses to appear for interview, form letter

040.187A is to be mailed to the tenant. A copy of the letter is to be retained in the tenant folder.

4. Preparation of Cases for Submission to Tenant Review Board

It is suggested that Section V, Documentation of Tenant Cases, be carefully reviewed in connection with the preparation of cases to be submitted to the Tenant Review Board.

All tenant cases submitted for consideration by T.R.B., whether with a recommendation to terminate tenancy or with any other recommendation, such as referral of the case to the Social Services Division, must be prepared in the manner specified below.

a. Format of Manager's Summary of Case

The Manager's summary of the case consists of (1) a face sheet containing basic identifying and informational data; and (2) the detailed chronological summary and the Manager's recommendation. The summary shall be prepared in an original and five copies. The first page of the summary shall be prepared on form 065.008, Summary of Tenant Record for Tenant Review Board (Face Sheet). The succeeding page(s), containing the detailed chronological summary and the Manager's recommendation, shall be prepared on 8½" x 11" white paper (bond paper for the original and manifold paper for the copies.)

b. Instructions for Preparation of Summary

(1) Face Sheet—Form 065.008—the information called for on form 065.008 as to the

project of origin, the tenant's name, address, account number, family size and apartment size are to be inserted in the appropriate boxes at the top of the page. The tenant's name is to be shown last name first. Where both husband and wife appear on the lease, both first names must be shown, even though one of them may be out of the household on a temporary or permanent basis, as in the following examples:

DOE, David (Deceased) And Dora

ROE, Richard And Roberta (Institutionalized)

SMITH, Selma—(Where only one name appears on lease)

In the section of the Face Sheet dealing with Family Composition and Income, it is important to list the names of all members of the family who reside in the household, as well as those members who are mentioned in the summary but who may be out of the household at the time the case is submitted to T.R.B. The information as to the date of birth, relationship, status and income is to be inserted in the appropriate columns. The Status column is to include information such as "employed", "housewife", "in school", "pre-school", etc. In addition, this column is to contain explanations as to the current whereabouts of missing members of the household such as "deceased", "separated", "O.O.H.—married 6/63", "in military service", "in prison", "in mental institution", "whereabouts unknown", etc.

The income of the various members residing in the household is to be shown in the appropriate column. However, where the family is receiving full or supplementary assistance from the Department of Welfare, a notation to this effect is to be made in the Income column. Where Welfare Department assistance comprises the sole or major source of the family's income, it will not be necessary to indicate the dollar amount of the projected net income.

The sections of the Face Sheet dealing with Basis for Submission of Case to T.R.B. and Nature of Problem are to be completed by insertion of an "x" alongside the appropriate items. The section of the Face Sheet titled Summary of Case is to include a brief statement, not to exceed a paragraph, giving the essence of the case and including the immediate cause for concern. The Face Sheet is to be signed by the Manager and dated.

(2) Chronological Summary—the detailed chronological summary is to be attached to the Face Sheet, form 065.008. The first entry in the chronological summary shall consist of the date that the tenant moved into the project, or into public housing, if the tenant formerly lived at another project. This shall be followed by a chronological listing in summary form of all relevant entries from the tenant folder and from such other records and reports as are pertinent to the case. The chronological summary should include staff contacts with the tenant, through letter or interview, pertain-

ing to attempts to effect corrective action, make agency referrals, etc. Wherever possible, the tenant's attitude and degree of cooperation should be reflected. Cases submitted with a recommendation to terminate tenancy shall contain as the closing entry of the chronological summary the details of the termination interview with the tenant. (See Section VII—A-1c.)

The Manager's recommendation is to appear at the conclusion of the summary, following the last entry of the chronological summary.. The Manager must clearly indicate his recommendation with each case submitted. If the recommendation appears to deviate from the standards contained in Section IV, Categories and Criteria of Non-Desirability, the Manager shall include in his recommendation the basis for the proposed exception.

The following general instructions are to serve as a guide in the preparation of the chronological summary:

All entries should be clear, concise and to the point.

Extraneous material, such as allegations and reports not related to the basis for submission of the case to T.R.B., should be excluded from the summary.

The use of verbatim reports or entries from the tenant folder should be avoided wherever possible. Such material should be summarized to reflect the substance of the report or entry.

All persons referred to in the summary should be clearly identified. As previously stated, numerical designations, such as (1) for the husband and (2) for the wife, shall not be used in the summary. However, it is permissible to use such abbreviated designations as Mr. A. or Mrs. Z, etc., provided that the identity of the person is clear from the content.

Unconfirmed allegations, reports which are not obtained firsthand, etc. should clearly state the source of such information.

Before submission of the case to T.R.B., summaries should be carefully reviewed and edited for possible clarification, correction, deletion or inadvertent omissions.

5. Routing of Tenant Cases to the Tenant Review Board

The tenant folder together with the original and four copies of the Manager's summary shall be forwarded to the T.R.B. by way of the Office of the Housing Division Chief concerned. The last copy of the Manager's summary shall be retained at the project as part of the dummy tenant folder.

In instances where two or more associated cases are submitted to T.R.B. at the same time, a listing of all the associated cases by tenant's name and account number is to be made on Routing Slip (009.011). Sufficient copies of the routing slip are to be made so that a copy can be attached to the face of each of the associated cases.

6. Submission of Additional Information or Material to T.R.B.

Should it become necessary to submit additional material to the T.R.B. while a case is under consideration by the Board, such material shall be forwarded directly to T.R.B. (not via the Division Chief's Office) in an original and four copies. The project is to retain a copy in the dummy tenant folder.

7. Review of Cases at Housing Division Office

All tenant cases intended for consideration by T.R.B. are to be reviewed at the Housing Division for completeness and conformance to policy and procedure prior to transmittal to the Board. All cases which come within the purview of the policy on non-desirability are to be forwarded to the T.R.B. whether or not the Division Chief agrees with the Manager's recommendation. The Division Chief is to note on the summary of the case his concurrence with or objection to the Manager's recommendation and the basis thereof. Cases are to be returned to projects by the Division Chief where the summary or presentation has not been prepared properly, where additional information or documentation is required, where proper procedure was not followed, or where the case does not come within the scope of the policy on non-desirability.

8. Tenant Review Board Processing of Cases

(For the jurisdiction, composition and mode of action of the T.R.B., see Section II, The Tenant Review Board.)

Upon receipt by the Tenant Review Board, all cases shall be noted in the appropriate Tenant

Review Board records and the files shall be checked for any record of prior contact.

a. Tenant Review Board Meeting and Decision After preliminary review by the Tenant Review Board staff and such further investigation and clarification as may be deemed necessary, each case shall be presented for consideration at a duly constituted meeting of the Tenant Review Board. Based upon its review of all the information available, the Board shall decide whether to (1) declare the family eligible; (2) refer the case for further investigation; (3) refer the case for Special Service Division evaluation; (4) defer action for a stated period of observation; or (5) make a preliminary determination of ineligibility pending appearance of the tenant before a panel of the Board. A final determination of ineligibility shall not be made until the tenant has been afforded an opportunity to appear before a panel of the Board. Only those tenants against whom a preliminary determination of ineligibility has been made shall be requested to appear before a panel of the T.R.B.

b. Notice of Opportunity to Appear before T.R.B.—(Form 065.003)

Where a preliminary determination of ineligibility has been made by the Board, a letter (Form 065.003) shall be sent to the tenant by the T.R.B., informing him that he may meet with a panel of the Board for the purpose of discussing his eligibility and stat-

ing his side of the case. The letter gives the tenant 10 days within which to indicate that he desires such a meeting. If the tenant does not reply within the specified period, the tenant shall be deemed to have waived his right to a personal appearance, and the preliminary determination of ineligibility shall be made final by the T.R.B. Chairman. If the tenant requests a personal appearance, the T.R.B. Chairman shall designate two or more members of the Board to meet with the tenant.

c. Appointment Letter for T.R.B. Panel Meeting—(Form 065.004)

Upon receipt of the tenant's request to appear and the designation of the T.R.B. panel members, an appointment letter (Form 065.004) shall be sent to the tenant informing him of the date and place of the T.R.B. panel meeting. The letter apprises the tenant of the general nature of the non-desirable conduct or behavior which is under consideration by the Board. The letter also advises the tenant that he may be assisted by an attorney or any person or persons of his own choosing, and that he may present any relevant material on his behalf.

A copy of each letter (forms 065.003 and 065.004) shall be forwarded by the T.R.B. to the Manager of the project concerned for his information.

d. Tenant Review Board Panel Meeting

The Tenant Review Board panel is not bound by the technical rules of evidence or

procedure, and a verbatim transcript of such panel meetings is not required. The presiding member of the panel presents the Authority's case. The panel may require, in its discretion, any person appearing before it to testify under oath, which may be administered by any member of the panel. The panel may grant adjournments and amendments and may at any time for any purpose refer the matter back to the Board. The Manager of the project concerned may, at his option, attend the panel meeting. However, the T.R.B. panel may require the Manager or any other staff member to attend for such purposes as the panel may deem necessary. Similarly, the T.R.B. panel may require any member of the tenant's family to attend the panel meeting.

A summary of the panel meeting, containing the panel's decision and recommendation, shall be prepared by the presiding member of the panel for submission to the Chairman of the Board. The majority decision of the panel shall constitute the decision of the Board and shall be final, unless the Chairman of the Board remands the case to the full Board, in which case the decision and final determination shall be made by the Board. If there is no majority decision by the panel, the case shall be remanded to the Board which shall render the decision and final determination.

In the event that the tenant fails to appear at a scheduled panel meeting of the Board without giving prior notice or without ar-

ranging for an adjournment, the tenant will be deemed to have waived his right to a personal appearance, and the preliminary determination of ineligibility shall become final. All decisions of the Board shall be executed by the Chairman of the Board. Eligible determinations shall be prepared on form 047.017; ineligible determinations shall be prepared on form 047.017B.

e. Notification of Tenant Review Board Decision

After a final determination that a tenant is ineligible, the tenant folder together with the Manager's summary and an original and one copy of the T.R.B. determination (form 047.017B) shall be returned to the Manager by way of the Office of the Housing Division Chief concerned. A copy of the T.R.B. determination (form 047.017B) shall be mailed directly to the tenant by the Administrator of T.R.B. and shall constitute notice to the tenant of the Board's decision.

f. Follow-up on Tenant Review Board Decisions

It is the Manager's responsibility to initiate necessary follow-up action stemming from the Tenant Review Board's decision. In the case of ineligible determinations this will require the prompt commencement of legal action to terminate the lease. In other instances this may require that the Manager obtain additional information, conduct further investigation or maintain a case

under close observation for a specified period and then return the case for T.R.B. reconsideration. In some situations the Board may instruct the Manager to maintain a case in status quo for a specified period of observation, with an authorization to the Manager to discontinue the action against the tenant without resubmitting the case to T.R.B., if the tenant is able to maintain a satisfactory record during this period. It is essential that the Manager comply with the Board's instructions in order to avoid unnecessary delays in processing cases, as well as to avoid the unnecessary resubmission of cases to T.R.B.

1. Notice to Vacate—(Form 040.004); Notice of Steps in Termination of Tenancy—(Form 040.196)

After a final determination of ineligibility, duly executed by the Chairman of T.R.B., and immediately upon return of the case to the project, the Manager shall arrange to serve a one month Notice to Vacate (form 040.004) upon the tenant. The Notice to Vacate legally terminates the tenancy as of the expiration date set forth therein. The Notice informs the tenant that he must vacate the premises on or before a specified date and that if he fails to do so, Holdover Proceedings to dispossess him will be commenced immediately.

A copy of form 040.196, Notice of Steps in Termination of Tenancy, shall be given to the tenant in conjunction with the service of the Notice to Vacate. Form 040.196 explains the

meaning of the Notice to Vacate and informs the tenant of the subsequent steps in the termination procedure. If feasible, the steps involved in the Holdover Proceedings should be explained to the tenant in person. The tenant should be informed of the approximate amount of time he will have to find other quarters, and that his appearance in Court may be avoided by signing a Stipulation Consenting to Judgement of Possession and Stay of Issuance of Warrant (form 040.078). (See Section B-3, below).

2. Holdover Proceedings

Holdover proceedings shall be commenced promptly at the expiration of the Notice to Vacate, or at the expiration of any authorized extension of such Notice. Holdover Proceedings are commenced by the service of a Notice of Petition and Petition upon the tenant or tenants of record. The Notice of Petition summons the tenant to appear in Court on a specified date, and to answer the complaint against him set forth in the Petition. The Petition sets forth the basis upon which the Authority seeks to recover possession of the premises. (See the applicable section of Chapter VII of the Management Manual for the method of preparation, filing and service of the Notice of Petition and Petition, affidavits of service, transmittal to the legal Department and preparation prior to the trial).

Appendix H

Rent and Rent Collection

List of Charges

IV. Procedure for Imposition of Additional Rent Charges

The imposition of additional rent charges against a tenant, in regard to the subject matter of this Appendix, is authorized by the Tenant Rules and Regutions which every tenant receives.

These charges, which must be fair and reasonable, are divided into three separate and distinct categories, as follows:

A. Where it is established that Authority property has been damaged by the tenant, or any member of his family, reasonable wear and tear excepted;

B. Where additional or extra services are provided by the Authority for the tenant or any member of his family such as lock-out service, replacement of keys, etc.;

C. Where extra services are performed by the Authority by reason of the infraction by the tenant, or any member of his family, of requirements or rules established for the proper administration of the project, the protection of the landlord's property, the safety, convenience and quiet enjoyment of the premises by other tenants.

The basis for imposing charges in the first and second categories requires little explanation. The third type of charge is imposed for such acts as walking on the grass, leaving carriages in the hallway, dropping garbage out of the window, bicycle-riding in prohibited areas, loitering, etc.

Accordingly, the first occurence of an incident in the third cateory will be followed, as soon as possible, by an interview with the tenant and, if deemed necessary, the offending member of the family. The tenant is to be given a full opportunity to present his side of the story. Based upon the nature of the infraction, the record of the tenant and the attitude displayed by the tenant at the interview, the Manager shall determine what action is to be taken. A summary of the interview should also be entered in the file, stating all pertinent facts and the reason for the Manager's decision. It is imperative that no action, by warning or by rent charge, be taken without affording the tenant an opportunity for interview with a member of the project staff. In general, this procedure should also be followed in regard to the first category. Where there is an indication either from the record or by the tenant's attitude that the violations are a continuing course of conduct which may lead to serious consequences, the Manager shall confirm what transpired at the interview by letter to the tenant with a copy for the tenant file.

It is outside the scope of this type of charge to take action under the third category in respect to disorderly or assaultive behavior. This type of conduct is not within the contemplation of these Authority rules and is to be dealt with strictly as a police matter, or in some other manner conducive to preventing a repetition thereof. Nor are charges in this category to be imposed as a punitive measure upon tenants of an entire building or stairhall in regard to an incident or to correct conditions in general.

It is important where the Manager decides that a charge is to be imposed that: (1) the tenant or the particular member of the family involved be properly identified with the act involved; (2) if a child is

involved, its age should be considered; (3) a charge be justified under the circumstances of that particular case, and it is usually preferable that a warning should have preceded the imposition of a charge; (4) the charge be reasonable, bearing some relation to the nature of the incident and to the record of the tenant in regard to such or similar incidents.

The ultimate responsibility for the Authority's ability to sustain this type of rent charge rests primarily upon the Manager. The manner in which the factors referred to above are handled at the project level will largely control the subsequent outcome of a case taken into court, if a tenant should decide to litigate the validity of a charge.

If any serious question arises with regard to the imposition of additional rent charges, the Legal Department should be consulted, after the matter has been discussed with the Chief Manager.

Appendix I, New York City Housing Authority—Form of Resident Monthly Lease Agreement

NEW YORK CITY HOUSING AUTHORITY

RESIDENT MONTHLY LEASE AGREEMENT

THE NEW YORK CITY HOUSING AUTHORITY (herein called the "Landlord") in consideration of the rental herein provided, and of the representations made by ....(herein called the "Tenant") as set forth in his signed application, his receipt herewith of the Tenant Rules and Regulations, and his undertaking to comply with all the regulations of the Landlord, hereby leases to the Tenant, and the Tenant hereby hires from the Landlord, Apartment No. ..... in premises ....., in the Borough of .....; City of New York, for a term of one (1) month, beginning the first day of ....., 19...., and terminating at midnight on the .... day of ....., 19...., at a rental of..... Dollars ($.....) per month, due the first day of ....., 19...., and payable such day of each month as the Landlord may decide. The above rental includes gas and electricity not in excess of a quantity which the Landlord in its discretion will fix, and may from time to time change.

This lease, unless terminated as hereinafter provided, shall automatically be renewed for successive terms of one (1) month each.

The Landlord or the Tenant may each terminate this lease and tenancy at the end of any monthly term by giving to the other one calendar month's prior notice in writing.

Any notice to the Tenant served pursuant to this agreement will be sufficient if delivered to the Tenant personally

or sent by mail to his premises, or affixed to the door of his premises. Any notice to the Landlord served pursuant to this agreement will be sufficient if delivered to the Manager personally or sent by mail to the Management Office located in the development.

IN WITNESS WHEREOF, the undersigned have executed this agreement on the ..... day of ....., 19.....

.....
Tenant

.....
Tenant

NEW YORK CITY HOUSING AUTHORITY

By .....
Manager

In the Presence of:

.....

Appendix J—New York City Housing Authority—Form of Tenant Rules and Regulations

(Non-subsidized projects only)

NEW YORK CITY HOUSING AUTHORITY

TENANT RULES AND REGULATIONS

1. SECURITY DEPOSIT. EVERY TENANT IS REQUIRED to furnish a security deposit, which the Landlord shall hold as security for faithful compliance with the Rules and Regulations and with the terms of the lease.

2. EVERY TENANT IS REQUIRED:

CARE OF PREMISES. (a) To keep the premises in the best possible condition, and to refrain and cause the members of his family to refrain from injuring or defacing the buildings, from littering the grounds, and from shaking, cleaning or airing any bedclothes, rugs, mops, dust cloths, etc., at the windows, in the halls or on the roof.

LAWN OR YARD. (b) To maintain, care for, and at all times keep free from litter, any space assigned to the tenant for his exclusive use.

FIRE. (c) To take every precaution to prevent fires.

GARBAGE. (d) Where incinerators are provided, to have all garbage securely wrapped and placed in the incinerators; where incinerators are not provided, to have all garbage securely wrapped and deposited in the proper container at the time and place designated by the Landlord.

PETS. (e) Not to keep any animals on the premises.

MOVING DATE. (f) To comply with the directions given by the Landlord concerning moving date and time.

FUMIGATION. (g) To abide by all regulations pertaining to the moving in of furniture in order to provide for proper vermin control, and to pay the cost of fumigation or extermination.

WINDOW CLEANING. (h) To clean windows from the inside and, NOT from the outside.

DISPLAY. (i) Not to place any sign or notice of any kind in the premises, nor to have any exhibited from the windows.

ALTERATIONS. (j) Not to alter any fixtures or fittings in the premises, nor to paint the premises, nor to make any repairs or alterations whatsoever, without the written consent of the Landlord.

USE OF PREMISES. (k) To use the premises solely as a private dwelling for the Tenant and his family, and not to carry on any business, professional, or commercial enterprise of any sort or nature in the premises.

EXCESS UTILITIES. (l) Not to consume gas and electricity wastefully. The Authority will consider consumption to be wasteful if it is in an amount in excess of a reasonable and normal amount for the family.

STATEMENT OF INCOME. (m) To submit to the Landlord a signed statement or statements in the form fixed by the Landlord at such time or times as the Landlord may require, setting forth requisite facts as to the income of the tenant and his family, the number and identity of the members of his family, and such other relevant information pertaining thereto as the Landlord may require; to make available to the Landlord such supporting

evidence with respect thereto as the Landlord may require, including copies of returns submitted to and available information in the possession of governmental agencies and others.

ASSIGNMENT AND SUBLETTING. (n) Not to assign his lease, nor sublet, nor transfer possession of the premises, nor to take boarders or lodgers.

NOTICE OF CHANGE IN FAMILY COMPOSITION. (o) IMMEDIATELY to notify the Landlord of any birth or death or other change in the Tenant's family.

ADDITIONAL PERSONS. (p) Except for additions to the Tenant's family resulting from births, to OBTAIN the Housing Manager's consent in writing before allowing any person, other than a member of the Tenant's family listed in the Tenant's Certificate, to take up residence in the Tenant's apartment.

TRANSFER OR REMOVAL. (q) Whenever a change occurs in the size or composition of the Tenant's family, if and when required by the Landlord, to move to a dwelling unit of appropriate size prescribed by the Landlord in the same project or any other project, or, if the size of the Tenant's family is reduced to a single person, to quit and surrender the premises.

ADDITIONAL RENT. (r) To pay to the Landlord, if the Tenant misstates or misrepresents the correct income, additional rent in the amount of the difference, for the period involved, between the rent which would have been charged by the Landlord to the Tenant had the correct income been reported to the Landlord at the time required, and the rent actually paid by the Tenant during that period.

SELF-EMPLOYMENT. (s) To keep adequate and verifiable records, as required by the Landlord, of all

cash transactions relating to investments, loans, drawings, income, and expenses, if the Tenant's income is derived in whole or in part from self-employment. These records and their supporting evidence, including bills, receipts, bank pass books, statements, cancelled checks, and copies of returns submitted to governmental agencies, shall be available for examination by the Landlord.

INSTALLATION AND REMOVAL OF EQUIPMENT. (t) Not to install in the premises, without the written consent of the Landlord, any freezer, air conditioning unit, washing machine, clothes drier, ham radio set, radio transmitter, or other electrical appliances or equipment hereafter prohibited by the Landlord, nor any television or other antenna on the window sill or at any other place outside of the premises of the Tenant, or if such consent is given, not to install the same in any manner other than as prescribed by the Landlord; to remove any electrical or other appliances or equipment from the premises or other property of the Landlord whenever required by the Landlord.

CONDUCT IN PREMISES. (u) To refrain from any illegal, immoral or disorderly use of the premises.

COMMON PROJECT AREAS. (v) To comply with and obey all requirements prescribed from time to time by the Landlord concerning the use and care of the premises, and of any common or community spaces or other places in the project of which the premises is a part, including but not limited to stairs, halls, walks, drives, playgrounds, laundries, community rooms, storage rooms, and parking areas.

CONDITION OF PREMISES UPON VACATING. (w) To quit and surrender the premises whenever and for whatever reason his lease is terminated in good

order and repair, reasonable wear and tear excepted.

PAYMENT OF ADDITIONAL RENT CHARGES. (x) To pay to the Landlord as additional rent, the amount thereof to be added to and become part of the rent, payable with any succeeding rent payment, for default in payment of which the Landlord shall have the same remedies against the Tenant, by way of summary proceedings or otherwise, as in the case of non-payment of rent:

(1) the cost or reasonable value, as determined by the Landlord, of repairing any damage to the premises or the Landlord's property caused by the Tenant or any member of his family, reasonable wear and tear excepted;

(2) a reasonable charge, to be fixed at the discretion of the Landlord, for additional or extra services rendered by the Landlord to the Tenant or any member of his family;

(3) as liquidated damages, a reasonable charge imposed by the Landlord for extra services required by reason of the infraction by the Tenant or any member of his family of requirements or rules established for the proper administration of the project, the protection of the Landlord's property or the safety and convenience of other tenants;

(4) the amount of additional rent due pursuant to paragraph 2(r) hereof.

COMPLIANCE WITH FUTURE RULES AND REGULATIONS. (y) To comply with such Rules and Regulations as may hereafter be established by the Landlord.

3. RIGHT OF ENTRY. The Landlord expressly reserves the right to enter or to permit his representatives, agents, or employes to enter the premises at any

reasonable hour, with or without the permission of the Tenant, for the purpose

(a) Making investigations to determine the nature and extent of any condition therein existing in violation of any law or of any lawful rule and regulation of any governmental agency or public authority or violation of the Rules and Regulations of the Landlord.

(b) Examining the premises, exterminating insects or vermin, making decorations, and making such repairs, corrections, alterations, improvements or additions as the Landlord may deem necessary or desirable. The Landlord may take into the premises all materials required for these purposes, and may perform all work necessary for these purposes; and these acts shall not constitute a complete or partial eviction, or abate the rent, wholly or in part.

RECEIPT AND REPRESENTATION: The undersigned hereby acknowledge receipt of a copy of the foregoing Rules and Regulations of the New York City Housing Authority. It is further acknowledged by the undersigned that the said Rules and Regulations were read before the signing of this receipt. It is affirmed that no oral representations have been made by the Landlord. Representation is hereby made that the undersigned will comply with all the said Rules and Regulations of the New York City Housing Authority.

.....

In the Presence of: .....

.....

Date .....

Appendix K

(NOTE: This affidavit reflects the procedures followed by the Authority in all termination of tenancy cases for Non-Desirability with the addition that the particular facts in the *Humphrey* case are set forth.)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

67 CIV. 4236

CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

NEW YORK CITY HOUSING AUTHORITY, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

IRA S. ROBBINS, being duly sworn, deposes and says:

1. I am Vice-Chairman of defendant New York City Housing Authority, and a defendant in this action, and submit this affidavit in support of defendants' motion to dismiss the complaint herein and in opposition to plaintiffs' application for a temporary injunction.

2. This affidavit is based in part on my own knowledge and in part upon records and documents of the Authority

and reports from and conversations with employees of the Authority.

3. The Authority is a public corporation created for the purpose of providing "low-rent housing for persons of low income as defined by law or for the clearance, replanning, reconstruction and rehabilitation of substandard and unsanitary areas * * *" (New York State Constitution, Article XVIII, Section 1). To implement the Housing Article of the Constitution, the legislature adopted the Public Housing Law (Chapter 44-a, Consolidated Laws), and the operations of the Authority are governed by and conducted in accordance with the provisions of that law.

4. To accomplish these purposes, the Authority now operates a public housing program in New York City in which more than 144,000 families numbering 525,560 persons are housed in 157 public housing projects constructed at a cost of over $2,000,000,000. Financial assistance, in the form of loans, subsidies and guarantees to provide funds for the construction of public housing is supplied by the federal, state and city governments.

5. The objectives of the public housing program cannot be met by simply providing apartments with decent housing accommodations. It is essential to the legislative purpose and intent in providing public housing that such accommodations be part of the larger scheme to create a healthy and decent environment which is conducive to sound family and community life. These basic objectives would be defeated if the very dangers which the public housing program was created to eradicate were permitted to develop within public housing projects.

6. To carry out the legislative mandate and policies, and to administer the public housing program on an objective and efficient basis, the Authority has adopted regula-

tions which establish standards to govern the admission of persons and families of low income into its projects. One such regulation has established standards of desirability to be used to determine the eligibility for continued occupancy of tenants where the record shows that the family constitutes:

> a detriment to the health, safety or morals of its neighbors or the community;
>
> an adverse influence upon sound family and community life;
>
> a source of danger to the peaceful occupation of the other tenants;
>
> a source of danger or cause of danger to the premises or property of the Authority; or a nuisance.
>
> (Auth. Res. No. 62-9-683, sec. 2, attached hereto as Exhibit A)

7. The Authority's regulations establish, therefore, uniform and objective standards which are to be applied for termination of tenancy of persons and families residing in its public housing projects where such termination is under consideration.

8. The Authority's action in establishing non-desirability regulations was taken in accordance with power granted to it under the Public Housing Law (sec. 37(1w)), to adopt rules and regulations.

9. The Authority has also adopted procedures, part of which are annexed hereto as Exhibit B, which are prescribed to govern the action of its employees in processing

non-desirability cases of tenants under consideration for termination of tenancy.

10. These procedures prescribe that the project manager seek to correct the problems incident to non-desirability by meeting with the tenant and arranging referrals to social agencies wherever deemed necessary or advisable. The manager is required to meet with the tenant in respect to each incident and to warn him of the consequences of his failure to correct the problem, if the nature of the situation lends itself to corrective action. If the manager determines that the conditions are irremediable or that the situation does not lend itself to corrective action, the tenant is called to an interview with the manager, who discusses the entire record with him and informs him of his proposed recommendation for termination of the tenancy. The tenant is invited to reply to the matters under consideration and to furnish any other data, including documents which he considers pertinent. If the manager, after receiving such reply, concludes that he will recommend termination of tenancy he must advise the tenant in writing that he is recommending termination of the tenancy and that the tenant has the right to file a written statement which will set forth the tenant's position with respect to the matters complained of.

11. Thereafter, the tenant folder is forwarded to Central Office of the Authority where the matter is considered by the Tenant Review Board. If the Tenant Review Board considers that a prima facie case of non-desirability has been established, the tenant is notified in writing that he is entitled to have a hearing before a panel of the Tenant Review Board, and that he may bring an attorney or anyone else whom he wishes to assist him.

12. Prior to the date of the Tenant Review Board hearing, the tenant is given a statement of the Authority's

standards on non-desirability and a summary of the basis upon which action in that particular case is contemplated. On the date of the hearing, the Chairman of the Tenant Review Board panel reads the entries in the tenant folder, which provide the record of the matters on which it is contemplated that action for non-desirability will be taken. It should be remembered that Authority procedures have required that the tenant be called in and informed of each of these matters at the project, and had been invited to give his explanation or reasons in regard thereto; that these matters were also reviewed by the manager and the tenant prior to the manager's recommendation for termination of tenancy. Therefore, the matters which are referred to by the Chairman of the Tenant Review Board panel had been previously reviewed completely with the tenant at the project and recorded in the tenant folder, together with the tenant's response or explanation thereto.

13. At the Tenant Review Board panel hearing, the tenant is entitled to present any information that he thinks useful or necessary to support his case and to answer the statements made at the hearing. When requested, the data contained in the tenant's folder is made available to the tenant or to the tenant's counsel prior to the Tenant Review Board panel hearing. If the tenant or tenant's counsel wishes to examine such data and considers that additional time is necessary to better evaluate such data and conduct an investigation, the tenant is afforded a continuance of the Tenant Review Board panel hearing to enable him to properly prepare and present his case.

14. After the parties at the Tenant Review Board panel hearing have completed the presentation of their case, the Tenant Review Board panel makes a determination which is required to be reviewed by deponent as the Chairman of the Tenant Review Board. If deponent approves the determination of non-desirability, the tenant and his counsel are advised thereof and the tenant is thereafter notified

of the termination of the tenancy by the service of a Notice to Vacate effected by the project.

15. This Notice to Vacate, served pursuant to the lease, gives the tenant at least one month's notice of termination of the lease. Upon failure of the tenant to move from the premises within the period prescribed by the Notice to Vacate, the Authority may commence holdover summary proceedings in the Civil Court of the City of New York. If the tenant believes that he is aggrieved by the administrative action taken by the Authority in regard to the termination of his tenancy, he can, within four months of the determination made by the Authority, institute a special proceeding in the Supreme Court of New York under article 78 of the New York Civil Practice Law and Rules, section 7801, *et seq.*

16. If the tenant fails to remove from the premises and if the Authority institutes a summary proceeding in the Civil Court, a final judgment of possession may be awarded to the Authority pursuant to the New York Real Property Actions and Proceedings Law, article 7, and that court is authorized to stay the issuance of a warrant of eviction for a period of six months (RPAPL, sec. 753).

17. The manager of the project is authorized to extend the period of the stay for an additional period of six months where he considers that the circumstances of the tenant warrant it. Additional extensions of the stay may be arranged by authorization from a higher official in the Authority. At the expiration of the stay, deponent is required to review the matter and must give his approval before the eviction of a tenant takes place. If circumstances involving a tenant have improved to a point where it is considered that tenant's future conduct will not infringe the standards of desirability established by the Authority, the tenant is accorded a further period of stay

to evaluate his conduct or his tenancy may be reinstated. During this entire period, if the assistance of defendant's social workers or outside social agencies is indicated, these are brought in to help by the project manager.

18. From the foregoing it is evident that a considerable amount of time, effort and consideration is accorded to a tenant whose tenancy is under consideration for termination. The act of termination is only part of a sequence of procedural steps where the tenant's record has been discussed, evaluated and reviewed at several stages by the Authority and its employees. The tenant has been afforded every opportunity to rebut the basis of the action taken by the Authority and to advance reasons why the action should not be taken. In addition, he has full access to the Supreme Court of New York where he can challenge the administrative action taken by the Authority on legal grounds. Moreover, if, during the period of stay of the warrant of eviction issued by the Civil Court, his conduct is favorably evaluated, the tenancy may be reinstated to full force and effect.

19. The facts in the case dealing with plaintiffs Humphrey show that they have lived in Bronxdale Houses, one of defendant's public housing projects, for about a year and a half, and they have three children aged 3, 2 and 1. Plaintiffs allege in their complaint, and it is not disputed, that Mrs. Humphrey was summoned to the housing project office in the spring of 1967 and informed that termination of her lease would be recommended as a result of her husband's arrest on a narcotics charge. Afterwards, Mr. Humphrey was in fact convicted for the possession of a hypodermic needle (McKinney's New York Penal Law, article 220, formerly section 1747-e; section 3305, Public Health Law). Based upon this conviction, the Authority's Tenant Review Board panel, after plaintiffs appeared before it with counsel, made a determination that plaintiffs

Humphrey were ineligible for continued occupancy. Thereupon, a Notice to Vacate, pursuant to and under a lease provision which gives either the Authority or the tenant the option to terminate the tenancy upon one month's notice, was served upon plaintiffs Humphrey by defendant.

20. Plaintiffs Humphrey also complain of a charge of $3 imposed upon them by defendant as additional rent by reason of work performed by a maintenance man to clear a toilet stoppage in their apartment. Our records show that the stoppage was caused by the introduction of a foreign object into the toilet bowl and was consequently the fault of someone in the Humphrey premises, and that the basis of the charge was, therefore, valid. The so-called constitutional questions raised with respect to this $3 rent charge are easily disposed of by the fact that the lease agreement between the parties, as implemented by the Tenant Rules and Regulations, authorized the imposition of such a rent charge by defendant. (Tenant Rules and Regulations annexed to the complaint herein as Exhibit B, par. 2-y). If plaintiffs Humphrey have any basis for resisting the imposition of this additional rent charge, the matter can readily be reviewed in a non-payment proceeding in the Civil Court when and if defendant seeks to collect this additional rent charge; the plaintiffs Humphrey can enter their defense in that proceeding. However, it is important to note that no legal steps have been taken by defendant to collect the $3 charge at this time.

20A. The facts in this case show that plaintiff Haywood has resided in one of defendant's public housing projects, General Grant Houses, for about ten years with two daughters aged 13 and 10. Plaintiff Haywood complains of additional rent charges which have been imposed upon her in the past, and it is not disputed that such charges have been imposed. An additional rent charge for $10 which was recently imposed upon plaintiff Haywood was re-

scinded after representations were made by her attorney. These additional rent charges were imposed by defendant on plaintiff Haywood by reason of and pursuant to the Tenant Rules and Regulations annexed to the complaint as Exhibit A. Paragraph 5(f) of the Tenant Rules and Regulations authorizes the imposition by landlord of additional rent charges in three types of situations. The situations which are described above fall into category "(3)". These charges are fixed after a discussion with the tenant and in light of the record of the tenant (and the family) in complying with defendant's regulations and the nature of the violation involved.

20B. The Authority has established procedures which govern the imposition of additional rent charges and a copy of these procedures has been annexed hereto as Exhibit C (Management Manual, Rent and Rent Collection, Chapter V, Appendix A, pp. 8, 8a and 9). On pages 8a and 9 of the Authority's procedure, it is prescribed that the tenant is to be interviewed as soon as possible after the occurrence of an incident, in order to afford him an opportunity to present his side of the story. The Manager is directed to refrain from imposing any rent charge unless the tenant is afforded an opportunity for an interview. Additional restrictions with regard to the imposition of such rent charges are prescribed on page 9 of the procedure.

20C. The procedure emanates from defendant's extensive experience in the operation of large scale public housing projects where compliance with landlord's rules and regulations are difficult to effectuate. It has also been found that the safety of the young children and elderly persons present are more effectively safeguarded where regulations are supported by the imposition of additional rent charges by reason of the extra work and supervision. Altogether, defendant has found that the effectiveness and

efficiency of project management has been effectuated by the use of additional rent charges and the safety of our tenants enhanced thereby. It is important to note that this additional rent charge is founded upon the lease agreement made between the parties and is in no sense a fine or penalty as characterized by plaintiffs in their complaint herein.

21. The non-desirability policy and procedures of the Authority are the result of the Authority's experience with serious problems which have developed in our projects in recent years. The problem has been accentuated because of the large concentration of children and elderly persons in public housing projects. The Authority has found that the development of a suitable living environment conducive to sound family and community life would be endangered, if not defeated, unless measures were taken against non-desirable conduct of project tenants. This policy is the product of the Authority's experience in the administration of a vast public housing program for over thirty years. This program is still in the relatively early stages of its evolution (*viz.*, sponsored and authorized by the United States Housing Act of 1937 and New York Public Housing Law of 1939). It is to be noted that defendant administers the largest public housing program in the United States so that the problems and complexities which it faces in administering this program are unique in many instances and are unequalled by any public housing program in the country. To the best of my knowledge, the safeguards established by the Authority for the protection of its tenants under the above procedures go far beyond procedures established by any other housing authority in the country, and beyond the requirements of the federal Department of Housing and Urban Development which, apparently received the sanction of the Supreme Court in *Thorpe v. Housing Authority of Durham*, 386 U. S. 670, 1967.

22. The particular grievances asserted by plaintiff in this action involve the power and discretion exercised by defendant under a delegation of power granted by the legislature of New York State. Although questions of the application of federal constitutional provisions have been raised by plaintiff, *i.e.*, due process and equal protection of the laws, authoritative decisions have consistently ruled that the purported constitutional issues in a case such as the present one should, in the first instance, be considered and adjudicated by the state courts of New York. The state courts of New York have never been confronted with legal issues of the nature presented in this action, and they should be afforded the initial opportunity to construe the administrative regulations and the state law governing public housing in light of the constitutional questions raised by plaintiff.

23. As stated above, there is ample, simple and expeditious judicial review available to plaintiffs in the Supreme Court of New York under an article 78 proceeding of the Civil Practice Law and Rules. The questions raised by plaintiff in this action are peculiarly matters of state concern which have in every instance been recognized by the United States Supreme Court as a valid basis for allowing the state courts to have the first opportunity to consider and determine the issues. Under established judicial policy of avoiding a decision on constitutional issues, it may conceivably be held by the state courts of New York that the action taken by defendant was legally proper and that a federal constitutional issue does not exist.

24. In any event, all of the matters raised by plaintiffs can be considered and decided by the courts of New York, which have the basic and primary responsibilty for dealing with the validity of the comprehensive regulations prescribed for public housing tenancies by the defendant herein under a statewide statute.

25. Plaintiff requests this court to restrain defendant from such a wide sweep and range of activities that the net effect will be to paralyze a vital part of the activities and services provided by defendant. It is requested that the defendant be restrained from executing any leases with new tenants pending the preparation of a new lease which shall meet constitutional requirements, as urged and conceived by plaintiff. This provision obviously requires the superintendence of the District Court, and, of itself, may lead to interminable litigation.

26. It is also requested that the Court restrain defendant from requiring tenants to pay additional rent charges despite the fact that defendant has approximately 144,000 lease agreements with 144,000 tenants, which provides for and authorizes such additional rent charges in several categories of circumstances; no sound legal reason has been adduced by plaintiffs as to why this contractual provision is not valid constitutionally.

27. It is also requested that defendant be restrained from conducting termination of tenancy proceedings against tenants in occupancy, referring probably to all of the administrative actions required to be taken by defendant precedent to the actual service of a Notice to Vacate against a tenant, including interviews between project managers and tenants. The broad sweep of this request makes no distinction between termination of tenancy proceedings regardless of the merits of each particular case.

28. It is also requested that defendant be restrained from securing orders against tenants who are presently involved in judicial proceedings in respect to the termination of their tenancies, and this request likewise suffers from the same deficiency as the preceding one, and therefore this request cannot be assessed in any proper and valid way by the Court.

29. It is also requested that defendant be restrained from enforcing a policy of terminating tenants on the basis of substantive standards which are vague and arbitrary, which request is itself vague and exhibits a complete lack of legal merit.

30. Finally, it is requested that defendant be required to revise its procedures dealing with the administrative termination of tenancy proceedings and in order to provide for an adversary-type of trial proceeding, and plaintiff proposes eleven specifications as the basis for judicial revision of defendant's administrative procedures.

31. As stated hereinabove, the broad sweep of the requests made of this Court to place restraints upon several important areas of defendant's day-to-day activities bespeak the necessity for denying all of the requests, en toto. It is to be noted that agreement has been reached heretofore between counsel for all of the parties involved that no action will be taken by defendant against any of the named plaintiffs in this and the companion actions, in respect to the specific matters which are in issue in the actions presently before the court until the motion for a temporary injunction and defendant's motion to dismiss are disposed of. At such time as the disposition is made by this Court on the two pending applications, further consideration, if necessary, can be given to the needs of the plaintiffs in respect to the posture of the case at that time.

32. Plaintiffs have a full and adequate remedy for their grievances in the state courts of New York under article 78, Civil Practice Law and Rules, and, therefore, there is no irreparable harm which a temporary injunction is required to protect against. On the other hand, the restraints sought to be placed upon an extensive variety of defendant's activities which are crucial to defendant's operations, will cause it and the public interest it serves irreparable harm.

33. It is quite evident that the interim relief requested by plaintiffs will bring about all of the relief ultimately requested in the action herein, and; in the absence of special and unusual circumstances, it is not the policy of the courts to award final relief on an application for a temporary injunction. In addition, defendant's brief herein shows that the Supreme Court has ruled that it is not a function of federal district courts to attempt to establish administrative procedures because the responsibility for taking such action has been given to and rests with the administrative agency. The vital operations of the defendant should not be brought to a halt in the absence of exceptionally unusual circumstances and a clear showing of probable success in the action itself. These two requirements have not been demonstrated herein. It is respectfully submitted that in a civil rights action not unlike the present one, but where much less sweeping relief was requested, *Randell* v. *Newark Housing Authority*, 3d Circuit decided October 3, 1967, the Court of Appeals denied an application for a temporary injunction against the eviction of the parties-plaintiff who were involved in that action; *a fortiori*, the reasons here for denying the requests for a temporary injunction, en toto, are more persuasive and compelling in the present case.

34. If fundemental changes are indeed required to be effected in defendant's policy, regulations and procedures, they should follow as the result of an orderly procedure, *i.e.*, upon a judgment after trial of the issues, if ultimately deemed necessary by the Court. A sweeping overhaul of the defendant's tenant procedures should not be effected in the guise of a preliminary injunction, especially where the claimed denial of due process and equal protection of the laws are not substantial, and manifest oppression of plaintiffs is lacking. The Court should not at the present time interfere with well-established policies and procedures which have been approved by responsible New York State

and Federal government officials and which have been applied over a number of years without serious question or legal challenge. Nor can a workable and permanent solution to the manifold and complex tenant procedures be achieved by judicial decree.

35. In view of the foregoing, it would be incongruous to impose abstract, constitutional limitations upon the action of the Authority without allowing the normal processes of state law to come into action in regard thereto. Although deponent is informed by counsel to the Authority that sufficient legal grounds have been adduced why federal jurisdiction of this action should be declined, deponent verily believes that the administrative action taken by the Authority in this particular case was founded upon a reasonable basis under valid, constitutional and legal regulations and that the Court should not substitute its judgment for that of the Authority as to the manner in which the Authority should administer the public housing program in New York City and deal with the varied and complex problems which arise under it.

WHEREFORE, deponent prays that the motion of defendants to dismiss the complaint be granted, and that plaintiffs' application for a temporary injunction be denied in all respects.

IRA S. ROBBINS

Sworn to before me this
15th day of December, 1967.

MAX M. FINKELSTEIN
MAX M. FINKELSTEIN
Notary Public, State of New York
No. 24-6298405
Qualified in Kings County
Commission Expires March 30, 1968

Appendix L.

Excerpt from House Committee on Banking and Currency, Report on the Housing and Urban Development Act of 1969, 91st Congress First Session, Report No. 91-539, p. 15.

House Committee

NEED FOR IMPROVED MANAGEMENT PRACTICES IN PUBLIC HOUSING PROJECTS

The committee is deeply concerned over cases of lax management in many public housing projects which have led to high operating costs, deterioration of property, and an intolerable environment for the families who live there. Among the reasons given to the committee to demonstrate the need for additional subsidies for existing housing projects, a sharp increase in vandalism was frequently mentioned together with a sharp increase in crime which has driven many occupants out of these projects. Much of the blame for these conditions lies with project managers and local government officials. Too frequently individual projects have filled up with problem families to the exclusion of others with resulting vacancy rates which have caused local budget deficits. It should be understood that the benefit of subsidized public housing is not an absolute right but should be made contingent on a decent standard of behavior and a sense of tenant responsibility. Project managers who do not enforce these standards are not doing the job expected of them by the Congress.

The low-rent public housing program has a fundamental role to play in meeting the needs of low income families and a special importance in making possible urban renewal and other programs which result in displacement. It would be disastrous if the small but growing number of cases of mismanagement undercut the program by giving

rise to public reaction against them and by driving out responsible families of low income. HUD should undertake promptly a review of its own local management guides with a view toward tightening them where necessary. At the same time it should make its own inspection and review of local practices to assure that project managers know the standards expected of them and fully enforce their own regulations, and further that they understand that additional Federal assistance is contingent upon proper management of present projects.

(House Committee on Banking and Currency, Report on the Housing and Urban Development Act of 1969, 91st Congress First Session, Report No. 91-539, p. 15).

Appendix M

Constitutional Provisions and Statutes

United States Constitution

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28 U.S.C.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

N. Y. Civil Practice Law and Rules

§ 7803. Questions raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

§ 7804. Procedure

. . .

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

N. Y. Real Property Actions and Proceedings Law

§ 743. Answer

At the time when the petition is to be heard the respondent, or any person in possession or claiming possession of the premises, may answer, orally or in writing. If the answer is oral the substance thereof shall be endorsed upon the petition. If the notice of petition was served at least eight days before the time at which it was noticed to be heard and it so demands, the answer shall be made at least three days before the time the petition is noticed to be heard and, if in writing, it shall be served within such time; whereupon any reply shall be served at least one day before such time. The answer may contain any legal or equitable defense, or counterclaim. The court may render affirmative judgment for the amount found due on the counterclaim.

APPENDIX N

Complaint, *Escalera et al. v. New York City Housing Authority.*

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 67 4307

PEDRO ESCALERA, ROSA ESCALERA, and ANNIE GALLAGHER,

on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, individually and in his capacity as a member of the New York City Housing Authority, and FRANCIS V. MADIGAN, individually and in his capacity as a member of the New York City Housing Authority,

Defendants.

COMPLAINT

I

The jurisdiction of this court is invoked pursuant to Title 28, U.S.C. §§ 1343(3), 2201, and 2202. This is an action for injunctive and declaratory relief authorized by Title 42, U.S.C. § 1983 to redress the deprivation of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and

by the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1401 et seq. and regulations promulgated thereunder.

II

This is a proceeding for a declaratory judgment declaring unconstitutional and illegal and for an injunction restraining enforcement of certain policies and practices of the defendants with regard to termination of tenancies of tenants in public housing owned, operated and managed by the defendants insofar as the defendants terminate tenancies without notice of the reasons therefor and, enforce rules and regulations as the basis for terminating tenancies without affording the tenants an administrative or judicial hearing meeting constitutional standards.

III

A. Plaintiffs Pedro and Rosa Escalera, husband and wife, adult United States citizens residents of the City, County, and State of New York, with their children Rosa, 16, and Pedro Jr., 19, now reside and for the past ten years have resided in Lillian Wald Houses, a low-rent public housing project owned and operated by defendant New York City Housing Authority at 30 Avenue D, New York, N. Y. Their public housing eligibility is based on low income. Because of their economic condition and the current emergency shortage of decent, safe and sanitary low-rent housing in New York City, the family cannot now obtain private housing. They have been notified by defendant that their tenancy will be terminated as of October 31, 1967, and that summary proceedings will thereafter be commenced to remove them from their apartment.

B. Plaintiff Annie Gallagher an adult United States citizen, a resident of the City, County, and State of New

York, presently resides in and for the past seven years has resided in Lillian Wald Houses, a low-rent public housing project owned and operated by defendant at 30 Avenue D, New York, N. Y. Her public housing eligiblity is based on low income. Because of her economic condition and the current emergency shortage of decent, safe and sanitary low-rent housing in New York City, she cannot now obtain private housing. She was notified on June 27, 1967 that her tenancy would be terminated by the New York City Housing Authority on July 31, 1967. After the expiration of that time, she was notified that a summary proceeding for possession of her apartment had been commenced in the New York State Courts.

C. In the cases of Escalera, Gallagher, and of all other persons similarly situated, the only issue that will be before the New York Courts in the summary proceeding will be whether the defendant New York City Housing Authority terminated the plaintiffs' lease and gave them notification of the termination. Under settled decisions of the New York courts, the plantiffs may not challenge the basis of the defendant Housing Authority's action or complain of the failure to accord them an administrative or judicial hearing on the reasons for the Housing Authority's action.

D. Plaintiffs are members of a class composed of all tenants in public housing projects in the City of New York who are now affected or may in the future be affected by defendants' policies and practices with regard to termination of tenancies without according the tenants an opportunity to know the reasons for the termination and to defend against the termination in either an administrative or judicial hearing, said policies and practices being enforced against tenants under the purported authority of the standard form lease which all tenants are required to sign. The class is further composed of all tenants in public housing projects in the City of New York whose ten-

ancies are terminated on the basis of alleged breach of the defendants' rules and regulations without being accorded an opportunity to contest the termination in an administrative or judicial hearing. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all members of their class. The persons in the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted in a way which is generally applicable to members of the class.

IV

A. Defendant New York City Housing Authority is a public corporation which is a corporate governmental agency organized under the constitution and laws of the State of New York, having its executive offices at 250 Broadway, City, County, and State of New York. The defendant owns and operates low-rent public housing within the City of New York financed by the United States Government, the State of New York and the City of New York.

B. Defendants Francis V. Madigan and Ira S. Robbins are members of the three member New York City Housing Authority and are charged by the laws of the State of New York with the responsibility for the operation of the aforesaid Authority including the promulgation of rules, regulations, and policies. On information and belief, the defendant Ira S. Robbins currently serves as Vice-Chairman and Chief Executive Officer of the New York City Housing Authority. Upon information and belief, the chairmanship and third seat of the aforesaid Authority is at present vacant.

V

Plaintiffs and members of their class, as a condition for occupancy of public housing are required to sign, prior to occupancy, a standard form lease and agree to abide by the "Tenants Rules and Regulations," attached hereto as Exhibits A and B respectively. The defendants commence legal proceedings for eviction on the basis of these documents as is set out more fully below.

VI

A. Plaintiffs Pedro and Rosta Escalera have resided in a public housing project owned and operated by the New York City Housing Authority for the past ten years. For many years, the plaintiff kept a dog. The defendant New York City Housing Authority had full knowledge of the presence of the dog. In August, 1966, an employee of the Housing Authority sent Mr. Escalera a letter stating that the presence of the dog was in violation of the rules and regulations of the Housing Authority, that the Authority had "received several reports of your dog dirtying up the stairhalls," and that the plaintiff had been requested to dispose of the dog. A fine or charge of additional rent of $10.00 was assessed by the Housing Authority without giving plaintiffs an opportunity to be heard on the validity of the charge. The letter, a copy of which is attached hereto as Exhibit C stated that a $20.00 charge would be assessed if the dog were not out of the apartment within 30 days.

Plaintiffs refused to pay the fines or "additional rent" and the defendant Housing Authority then proceeded to bring a summary proceeding for non-payment of rent. A copy of the Notice of Petition and Petition is attached hereto as Exhibit D. When the defendant was advised by plaintiffs' counsel that the plaintiffs would contest the validity of the assessment of the "additional rent," the defendant discontinued the proceeding.

In July, 1967, the manager of the Lillian Wald Houses, Mr. George S. Kasdin, an employee of the New York City Housing Authority asked the plaintiff Pedro Escalera about the dog and was informed by Mr. Escalera that the dog had been sold and was no longer in the plaintiffs' apartment. Mr. Escalera was informed that he would have to give written proof that he did not have the dog in the apartment.

On or about September 29, 1967, plaintiffs received a Notice to Vacate signed by Mr. Kasdin informing them that their tenancy was terminated and that they should vacate their apartment by October 31, 1967. A copy of this Notice is attached hereto as Exhibit E. The notice continued:

> PLEASE TAKE FURTHER NOTICE that upon your failure to remove forthwith from the said premises immediately after such termination, the New York City Housing Authority will commence summary proceedings under the statute to remove you from the said premises for holding over after the expiration of your term.

The proceedings referred to in the notice to vacate are holdover proceedings brought pursuant to New York Real Property and Proceedings Law § 711(1) in which the only issue is the adequacy of the service of the notice.

The plaintiffs will not be allowed to present their defenses to the Housing Authority's action in a holdover proceeding as the basis for the proceeding is not the presence or absence of a dog in their apartment or the violation or non-violation of a rule of the Housing Authority but is only the Authority's decision to terminate the lease without any reason or proof of reason being required.

The lease states in relevant part:

> "The Landlord or the Tenant may each terminate this lease and tenancy at the end of any monthly term by

giving to the other one calendar month's prior notice in writing." (Exhibit A)

The plaintiffs have had no opportunity to be heard in an administrative hearing and no opportunity will be accorded them in a judicial hearing, despite the fact that they believe that there is no basis for terminating their tenancy and that they have good and meritorious defenses to the Housing Authority's action which could be established at a judicial or administrative hearing. Since the Housing Authority has terminated their tenancy by using its power granted by the lease to terminate without reason or a hearing, they will not be given an opportunity to establish these defenses.

VII

Plaintiff Annie Gallagher has resided in a public housing project owned and operated by the New York City Housing Authority for the past seven years. She is sixty-nine years old and lives alone without a telephone. As a result of infantile paralysis in childhood, she is without the use of her right leg. Shortly after some people attempted to break into her apartment two years ago, she acquired a small dog for companionship and protection. The Housing Authority has had full knowledge of the presence of this dog for at least fourteen months.

On several occasions, plaintiff was called into the project manager's office and was told there had been complaints about her dog. She was not informed as to the nature of the alleged complaints or the identity of the alleged complainants despite her request for this information.

On or about June 27, 1967, plaintiff received a Notice to Vacate from the New York City Housing Authority, informing her that her tenancy would be terminated and that she would have to vacate her apartment by July 31, 1967. A copy of this notice is attached hereto as Exhibit

F. The notice was identical in form to that received by the plaintiffs Pedro and Rosa Escalera and contained the same notice that summary proceedings would be commenced if she failed to move out (Exhibit E).

On or about September 6, 1967, plaintiff received notice that the Housing Authority had commenced summary proceedings against her based on an alleged holdover. This proceeding is still pending and is scheduled for trial on November 17, 1967.

The plaintiff will not be allowed to present her defenses to the Housing Authority's action in the holdover proceeding as the basis for the proceeding is the Housing Authority's ex parte termination of her tenancy without reasons therefor or a hearing, judicial or administrative at which the accuracy and sufficiency of the reasons may be determined.

Plaintiff believes that she has good and meritorious defenses to the Housing Authority's action which could be established at a judicial or administrative hearing but because the Housing Authority has terminated her tenancy by using its power, granted by the lease which all tenants are required to sign, to terminate without reason or a hearing, she will not be given an opportunity to establish these defenses.

VIII

Defendants' policies and practices with regard to termination of tenancies have resulted in the denial to the plaintiffs and their class of rights secured to them by the Constitution and laws of the United States as follows:

A. The plaintiffs and their class have been denied due process of law in that as a requirement for occupancy they have been forced to execute a lease which purports to allow the New York City Housing Authority:

1. to terminate the lease upon the mere giving of thirty days notice without reasons

2. to terminate the lease upon the mere giving of thirty days notice without according tenants an opportunity to be heard in a judicial or administrative hearing

3. to terminate the lease upon the mere giving of thirty days notice without a hearing or giving reasons based on the Housing Authority's ex parte determination that a tenant has committed a "Breach of Rules and Regulations" of the Housing Authority, although the subsequent summary proceeding for an order of eviction is, under the laws of New York, without reference to the alleged violation of the "rules and regulations."

B. The plaintiffs and their class have been or may in the future be denied due process and the equal protection of the law in that the defendants accord some tenants an opportunity to be heard prior to eviction or termination of tenancy but do not accord plaintiffs and their class such an opportunity to be heard, namely, tenants whose continued occupancy is in question on the basis of alleged "Non-desirability" are accorded an opportunity to appear before a Tenant Review Board whereas tenants such as plaintiffs and their class whose continued occupancy is in question on the basis of alleged breach of "Rules and Regulations" are not accorded an opportunity to appear before the Tenant Review Board and are not given any opportunity to be heard or to contest the termination of their tenancy; in violation of the rights secured to them by the Fourteenth Amendment to the United States Constitution.

C. The plaintiffs and their class have been or in the future may be denied due process and the equal protection of the laws in that as a result of the policies and practices of the defendants complained of above, the plaintiffs and their class may be evicted from their apartments in public housing without an opportunity to contest the basis of the eviction at a hearing, administrative or judicial as is required by the Fourteenth Amendment to the United States Constitution.

The named plaintiffs as well as all others similarly situated on whose behalf this suit is brought are threatened with irreparable injury by reason of the acts of defendants complained of above in that they face eviction from governmentally operated public housing despite the fact that they have lived there for many years and have paid and continued to pay their rent. Eviction would cause severe hardship in that plaintiffs and their class are persons of low income who, because of the current emergency shortage of low-rent decent, safe, and sanitary housing in New York City cannot obtain housing in the private market. Plaintiffs and their class have no adequate administrative remedy or remedy at law.

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this court:

1. Enter a temporary restraining order and preliminary injunction restraining the defendants from

a. Evicting or initiating court proceedings seeking the eviction of the plaintiffs Pedro Escalera and Rosa Escalera from their apartment in Lillian Wald Houses, a public housing project owned and operated by the defendant New York City Housing Authority, and

b. Evicting or proceeding with summary proceedings for an order of eviction against the plaintiff Annie Gallagher from her apartment in Lillian Wald Houses, a public project owned and operated by the defendant New York City Housing Authority, pending hearing and determination of the plaintiffs' motion for a preliminary injunction.

2. Enter a preliminary and permanent injunction enjoining defendants and their agents, employees, successors and all persons in active concert with them from:

a. Continuing to obtain orders of eviction of tenants through summary judicial proceedings unless the tenants

have first been afforded an opportunity to contest the reasons for the termination of tenancy upon which the summary proceeding is based at a fair hearing, whether before the agency or a court which complies with the minimal elements of due process of the laws.

b. Continuing, as a prequisite to tenancy, to require all tenants to sign a lease and Tenants Rules and Regulations which purport to allow the defendant New York City Housing Authority to terminate the lease without reasons and without according to tenants a fair hearing, administrative or judicial, at which they may contest the termination.

c. Failing to negotiate, within such reasonable time as may be set by this court, a new lease with the plaintiffs and members of their class which complies with the requirements of the Constitution and laws of the United States in that such lease may be terminated for cause only and only after the tenant has been afforded an opportunity to be heard at a hearing, judicial or administrative.

3. Enter a declaratory judgment that the policies and practices of the defendants complained of herein violate rights of the plaintiffs and their class secured by the Constitution and laws of the United States.

4. Allow plaintiffs their costs herein and grant such further or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

343

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR, and ARAMIS GOMEZ*,

Petitioners,

against

PEDRO ESCALERA and ROSE ESCALERA,

Respondents.

(*Continued on back*)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

ROSE LEE ROLLE,

Respondent.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

WALTER LOCKMAN and VIOLA LOCKMAN,

Respondents.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD,

Respondents.

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* The above-named officials now hold the positions as the members of the New York City Housing Authority, and supersede the officials originally named as defendants in the proceedings below, i.e., Francis V. Madigan and Albert A. Walsh. Rule 48(3), Rules of the Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, New York City Housing Authority and the individual members thereof, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the cases herein on April 29, 1970, which reversed judgments entered in the District Court in favor of petitioners.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears in Appendix A, pp. 1a-25a. The opinion of the District Court is unreported and appears in Appendix B, pp. 26a-37a.

Jurisdiction

The judgments of the Court of Appeals were entered on April 29, 1970 and appear in Appendix D, p. 41a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the administrative procedures, followed by the Authority for termination of public housing tenancies, satisfy the requirements of due process under the Fourteenth Amendment.

2. Whether the availability to the tenant of an Article 78 proceeding in the New York courts to review the Authority's action and determine whether it is illegal, arbitrary or unreasonable, satisfies any residual requirements of constitutional due process with respect to the Authority's procedures.

3. Whether the Court of Appeals should properly have reached or passed upon the constitutional issues raised in these cases when there was no dispute as to the material facts upon which the administrative proceedings were predicated.

4. Whether additional rent charges provided for in the Authority's lease with its tenants, which become legally enforcible by the Authority only after a full scale *de novo* trial in the Civil Court where every defense is available to the tenant, requires a prior administrative adversary hearing before the Authority may assert its claim and bring suit.

5. Whether under the complex procedures established by petitioner for termination of tenancies, the issues raised by respondents should first be adjudicated by the courts of New York under the principle of abstention.

6. Whether the Court of Appeals was correct in ruling that a proper cause of action, vesting jurisdiction in the federal District Court pursuant to the Civil Rights Act, 42 U.S.C. § 1983, had been established by the complaints when, at best, only property rights are involved.

7. Whether the Court of Appeals was correct in reversing the judgment, in effect summary judgment, granted by the District Court in favor of the Authority.

8. Whether the Court of Appeals was correct in holding that a *prima facie* basis for a class action had been established.

Constitutional Provisions and Statutes Involved

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution.

The federal statutes involved are 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3), 2201 and 2202, Appendix M, pp. 125a-127a. The New York State statutes involved are N. Y. Civil Practice Law and Rules, §§ 7803 and 7804(d), Appendix M, pp. 126a-127a; Real Property Actions and Proceedings Law, § 743, Appendix M, p. 127a.

Statement of the Case

A.

The respondents in these four actions, consolidated below for the purpose of the appeals, are tenants in occupancy at various low-rent housing projects (hereinafter Tenant or Tenants) owned and operated by the petitioner New York City Housing Authority (Authority). In the several purported class actions brought by the Tenants in the District Court for the Southern District of New York, pursuant to the Civil Rights Act, 42 U.S.C. § 1983, they claim violation of their rights under the Fourteenth Amendment and they seek money damages, injunctions, and declaratory judgments against the Authority. Jurisdiction is invoked under 28 U.S.C. §§ 1343(3), 2201 and 2202. It is claimed that these alleged violations occurred in connection with the termination of their tenancies in the Authority's public housing projects and by the assertion of additional rent charges by the Authority.

Respondents have alleged, *inter alia*, that the written notices of the reasons for termination of tenancy were constitutionally insufficient, that Authority procedures failed to afford these Tenants an opportunity to confront and cross-examine witnesses on whom the Authority relied in terminating their tenancy, that there was an improper use of items in the respective tenant folders reputedly unknown to the respondents and on which the Authority had relied in terminating tenancies, and that they were denied access to a Tenant Review Board Handbook which deals with Authority procedures for terminating tenancies on the ground of Non-Desirability. It was also alleged that the Authority's failure to follow adversary procedures in regard to the assertion of additional rent charges was a violation of due process.

The Authority brought on motions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the actions for, *inter alia,* failure to state a claim upon which relief could be granted, lack of jurisdiction, lack of a substantial federal question, failure to exhaust administrative remedies, and upon the ground that the federal courts should abstain from considering these actions pending a determination, by New York State courts in the first instance, of the questions raised herein.

Affidavits and documentary evidence were submitted by the respective parties, and on October 31, 1968, District Judge Sylvester J. Ryan rendered an opinion which granted the Authority's motions and dismissed the actions on the merits.

The respondents took an appeal to the Court of Appeals, Second Circuit, which rendered an opinion and entered judgments on April 29, 1970 which reversed the judgments of the District Court and remanded the actions to the District Court for consideration of respondents' motions for preliminary relief and for trial on the merits. By order made on June 4, 1970, the Court of Appeals, Second Circuit, stayed the issuance of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

B.

Public housing authorities face a difficult problem in coping with families whose conduct is undesirable, objectionable, or in violation of reasonable regulations governing operation of public housing projects. This problem is accentuated by the large concentration of children and elderly persons in public housing projects. The development of a suitable living environment conducive to sound family and community life would be endangered, if not defeated, unless appropriate measures are taken against the undesirable conduct of problem tenants (see affidavit

of Ira S. Robbins, Appendix K, p. 117a). Congress is fully aware of this serious problem, and its concern is reflected in the report of the House Committee on Banking and Currency on the Housing and Urban Development Act of 1969 (see Appendix L, p. 123a).

Practices and procedures of the Authority with respect to tenant occupancy and termination of tenancy have been developed over the more than three decades that its public housing program has been in effect. Apartments are leased for a term of one month. Each lease is automatically renewed for additional terms of one month, unless either party terminates the tenancy by one month's notice in writing. Continued occupancy depends upon compliance with Authority regulations. Tenants are entitled to reasonable safeguards against arbitrary action by the Authority in terminating their tenancies, and the Authority has therefore developed detailed procedures over the past thirty years that are intended to give fair and adequate consideration to the rights of tenants.

Copies of these procedures were submitted to the District Court in support of the Authority's motions to dismiss the complaints, and appear at Appendices E and F, pp. 45a-59a.

The tenancy of *Humphrey* was terminated on the ground of Non-Desirability. The proceedings against *Rolle*, also charged with Non-Desirability, were suspended. The tenancy of *Escalera* was terminated for Breach of Rules and Regulations. The co-plaintiff in the *Escalera* action, *Gallagher*, died during the pendency of the appeal. *Lockman*, *Haywood*, *Humphrey* and *Escalera* claim that the Authority violated their constitutional rights under the Fourteenth Amendment in respect to the imposition of additional rent charges.

With respect to termination of tenancy for Non-Desirability, the Authority showed by affidavit of the

Vice-Chairman of the Authority, Ira S. Robbins, and by printed procedures submitted with its affidavits in support of its motions to dismiss, that a detailed procedure existed which the Court of Appeals found "admittedly satisfy the requirements of the Department of Housing and Urban Development circular of February 7, 1967, considered by the Supreme Court in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268 (1969)." (Appendix A, p. 12a).

Such procedures require the manager of the housing project to write to the tenant and request him to attend an interview in every instance where an incident occurs which may become the basis for termination of tenancy. At the interview the manager is required to state the reasons for the interview, explore them with the tenant insofar as they may possibly lead to termination of tenancy, secure the tenant's explanations, and caution the tenant to correct the matter(s) complained of. After the interview the manager may recommend termination of the tenancy if he finds the incident, or accumulation of incidents, of sufficient gravity under the Authority's established standards governing desirability of tenants. (See Appendix G, pp. 64a-68a.) In the event that the manager recommends termination of the tenancy, he so informs the tenant at another interview, and the tenant is invited to submit any data or documentary evidence which he considers appropriate for his defense. The manager thereupon is required to submit to the Authority's Tenant Review Board (hereinafter TRB) the tenant folder together with his summary report and recommendation for the termination of the tenancy, and the tenant's answer thereto and documents submitted by him, if any.

The report of the manager is concerned solely with the incidents and the matters which had occurred in the past,

and regarding which the manager had either conducted an interview with the tenant or requested an interview appointment which the tenant failed to keep. (See TRB Handbook, p. 23, Appendix G, p. 88a).

The manager's report and recommendation together with the tenant's answer are forwarded to TRB at the central office of the Authority. There they are considered by a body of officials consisting of the Chairman, who is one of the three members constituting the Authority, a representative of the Legal Department, a representative of the Management Department, the Administrator of the Board, a representative of the Community Affairs Division, a representative of the Community and Social Services Department and two housing project managers.

After reviewing the record TRB may reject the manager's recommendation, may require further investigation, may order the case held in status quo, or may direct a social evaluation report to be made. When TRB is of the view that consideration of termination of tenancy is appropriate the tenant is so notified, and informed that he may request a hearing before the TRB. If he responds affirmatively he receives a letter which specifies a date for the hearing, sets forth the standards established by the Authority for determining Non-Desirability (Appendix G, p. 92a), and outlines the general nature of the non-desirable action or conduct involved. As above set forth, this had previously been discussed at the project between the manager and the tenant and had been summarized by an entry in the tenant folder. The tenant is further informed that he may have the assistance of an attorney or other person at the hearing to be scheduled. The Authority's proof in the *Rolle* case (which is admitted in the *Rolle* complaint) showed that the tenant was offered access to the tenant folder upon request in order to again acquaint her and her counsel with the incidents and conduct

which were the subject matter for consideration by TRB. Adjournments are granted to tenants if they need more time to prepare their cases after they have been advised of the matters presented to TRB.

Under Authority procedures, the chairman of the TRB has the power to issue subpoenas and swear witnesses in any case where the circumstances dictate that such action be taken.

At the TRB hearing the TRB administrator recites the incidents or conduct to be considered by the Board. The tenant and his counsel may submit such written documents and data as they wish, and may present any oral reply with respect to the matters under consideration. They may also present witnesses who may make oral statements. If the TRB determination is adverse to the tenant, the action of the TRB is reviewed by the Chairman of the TRB, who is a Member of the Authority. If approved, the tenant and his counsel are so informed and the project manager is directed to serve a 30-day Notice to Vacate, pursuant to the monthly lease. This was the procedure followed in respect to the *Humphrey* case. In the *Rolle* case Mrs. Rolle and her counsel appeared at the TRB hearing and presented a list of demands (which had already been provided in summary form), including a request for advance written notice of the charges, that a stenographic transcript of the proceeding be kept, that persons with actual knowledge of the charges be present for confrontation or cross-examination and in addition, that an impartial hearing examiner be used. When these demands were rejected, Mrs. Rolle and her counsel refused to go forward with the hearing. The Authority having suspended further action pending the outcome of these cases, no TRB determination was made in the *Rolle* case.

With respect to *Escalera*, the complaint admitted (Complaint, par. VI, Appendix N, p. 132a) that a dog had been harbored over a period of years in violation of the Authority's regulations. Under the Authority's regulations such conduct constitutes a ground for termination of ten-

ancy, denominated as Breach of Rules and Regulations. The manager of the project, being unable to persuade the tenant to remove the dog from the premises, and not receiving requested proof from Mr. Escalera that he had done so, recommended termination of the tenancy. In accordance with procedure in such cases (See Appendix E, p. 111a), the tenant answer, the tenant folder, together with the report of the manager were forwarded to a Reviewing Official, who is a high administrative official of the Authority. The Reviewing Official made a determination that Escalera was ineligible for continued occupancy and he authorized termination of the tenancy.

With respect to *Lockman*, the Authority's procedure for asserting additional rent was brought into question on a constitutional basis. *Humphrey, Haywood* and *Escalera* also complain of the additional rent charges. *Lockman* was charged as additional rent $2 by reason of his son playing ball on Authority property; $5 for his son's riding a bicycle on Authority walks; and $2 for a ball-playing incident, which was reduced to $1 after reconsideration was requested by the Lockmans. These additional rent charges were paid. The Authority's basis for the additional rent charges is the lease agreement and the Tenant Rules and Regulations, each signed by the tenant, copies of which are annexed as Appendices I and J, pp. 100a-107a. (See par. 2x, Tenant Rules and Regulations, Appendix J, p. 106a). The Authority's printed procedure for the assertion of such additional rent charges requires the project manager to call the tenant in for an interview to discuss the matter. A copy of the procedure appears in Appendix H, pp. 97a-99a. If the manager is satisfied that a basis exists for the assertion of such a charge, the tenant is informed that the amount claimed, which is required under the Tenant Rules and Regulations to be a reasonable charge, will be added to the rent obligation payable the following month. If the tenant refuses to

make such payment, the Authority is required to institute legal action in the Civil Court of the City of New York in order to recover it. Upon the trial of the action in the Civil Court the Authority must prove its claim *de novo*. The Humphreys were charged $3 additional rent for a toilet stoppage and the co-plaintiff in the *Humphrey* action, *Haywood,* was charged $5 for the actions of her brother in dirtying the project premises. The brother was not a tenant and did not live in the project. Subsequent charges against this tenant and *Escalera* were withdrawn at the intervention of counsel.

Reasons for Granting the Writ

Summary

1. The opinion of the Second Circuit lays down novel and unprecedented guidelines to be followed by public housing authorities in administrative proceedings for the termination of tenancies in public housing. These extend due process requirements far beyond those made by this Court, by the Supreme Court of Illinois, and by the Third Circuit. They further conflict with decisions of the New York State Court of Appeals.

2. The Authority's termination of tenancy proceedings in each of the cases under which its procedures are challenged were founded upon established, undisputed facts. In *Humphrey* and *Ralle* there were criminal convictions; in *Escalera*, a dog had admittedly been kept by the tenant for years in violation of Authority regulations. Under these circumstances the procedural due process requirements laid down by the Second Circuit in respect to Notice, Cross-examination, and Findings were supererogatory, and its holding was nothing more than an advisory opinion on abstract, hypothetical issues which this Court has consistently ruled should not be adjudicated in a constitutional context.

3. The Second Circuit ruling conflicts with principles of law, long established by this Court, that the availability of judicial review by a state court of an administrative determination before it becomes legally effective, satisfies any residual due process requirements of the Fourteenth Amendment.

4. The Second Circuit holding that the additional rent charges claimed by the Authority (which can be recovered only after a *de novo* trial in the Civil Court of the City of New York), requires an adversary-type hearing at the administrative level, is not mandated by due process, and is in conflict with established law enunciated by this Court.

5. The Second Circuit refused to apply the principle of abstention, to afford the New York State courts the opportunity in the first instance to pass upon the issues raised herein with respect to administrative procedures, in accordance with rulings made by this Court, as recommended by the Third Circuit in *Randell* v. *Newark Housing Authority, infra,* and thereafter applied by the District Court of New Jersey in that case.

6. The conclusions of law enunciated by the Court of Appeals have established far-reaching principles which will extend beyond the reach of the present litigation to the more than two thousand public housing authorities throughout the country. A number of cases involving these issues are now pending in Federal and State courts. The effect of the Court of Appeals decision is too monumental to be allowed to remain the law of the case without affording the Authority a full opportunity to challenge its soundness. Important questions of procedural due process, decided for the first time by an appellate court with respect to public housing, require consideration and clarification by this Court before becoming established as the law of the land. The sweeping generalizations of the opinion, coupled with a remand for consideration of the issuance of a temporary injunction on a class action basis, may radically alter existing procedures of this Authority and housing authorities throughout the country before this Court will have an opportunity to review the question. If certiorari is not granted administrative action in these areas of activity may be inhibited, if not paralyzed. Under the constraints of the Second Circuit opinion the District Court will be readily persuaded that the law of the case has been established, and that it only remains for the lower court to implement the principles stated in the opinion. The tenor of the opinion has placed extremely difficult, if not insurmountable, obstacles to the Authority's defenses at the trial.

ARGUMENT

I

A.

The procedures established by the Authority exceed the requirements laid down in the HUD circular of February 7, 1967, as described in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268 (1969). With respect to *Humphrey* and *Rolle*, the procedures afforded to them also exceeded the procedures followed in *Randell* v. *Newark Housing Authority*, 384 F. 2d 151 (1967), cert. denied *sub nom.*, *Avent* v. *Newark Housing Authority*, 393 U. S. 870 (1968), a Civil Rights Act suit brought by public housing tenants, and in *Chicago Housing Authority* v. *Stewart*, 43 Ill. 2d 96, 251 N. E. 2d 185 (1969), cert. denied, 397 U. S. 1000, March 23, 1970. In regard to termination of a public housing tenancy for undesirability, the Third Circuit in *Randell*, because it vacated the stay and preliminary injunction theretofore granted in favor of the tenants, appeared to sustain procedures followed by the Newark Housing Authority which afforded the complaining tenants there substantially less than what this petitioner provides for its tenants at a TRB hearing. Likewise, the procedures followed by the Chicago Housing Authority in terminating the Stewart tenancy allowed the tenant considerably less in the way of adversary-type procedures than are afforded by this Authority.

Consequently, there now exists a significant difference and conflict in holdings made in the area of procedural due process involving the termination of public housing tenancies between the Second Circuit, the Third Circuit and the Illinois Supreme Court, and more particularly, with respect to the specific issues of procedural due process decided in these cases by the Second Circuit. Moreover, in

both the *Randell* and *Stewart* cases, despite the absence of findings, of formal notice, of cross-examination and confrontation which the Second Circuit ruled was mandatory under the Fourteenth Amendment, this Court denied review requested by the petitioning tenants.

Issues of procedural due process must be determined according to "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished —these are some of the considerations that must enter into judicial judgment." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 163 (1951), Frankfurter, J., concurring. "The very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961). In *Cafeteria Workers*, *supra*, this Court stated that the Fifth Amendment, and by inference, the Fourteenth Amendment ". . . does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria Workers*, 367 U. S. at 894. See also *Hannah* v. *Larche*, 363 U. S. 420, 442-443 (1960). In the present cases, in the absence of any material issue pertinent to the grounds for termination of the respective tenancies, there was no constitutional basis for invoking the full panoply of a trial-type hearing in order to comply with procedural due process.

B.

Countless administrative determinations are reached by informal administrative procedures. (*Davis, Discretionary Justice*, 1969, pp. 98, 118, 186). Recent decisions of the Court of Appeals of New York authorize and sanction the use of informal administrative procedures wherein hearsay

evidence may be received and considered. In *125 Bar Corp. v. State Liquor Authority,* 24 N.Y. 2d 174, 179, 247 N. E. 2d 157, 299 N.Y.S. 2d 194 (1969), the New York court adjured New York administrative agencies to use common sense and a fair approach in using such materials, with such use depending in each case upon the circumstances and qualities of such materials. In *Colton* v. Berman, 21 N. Y. 2d 322, 329, 284 N. E. 2d 679, 287 N.Y.S. 2d 647 (1967), it was held that in matters pertaining to rent control and valuation of property made for the purpose of establishing residential rents, a full evidentiary hearing is not required nor are findings necessary. The New York Court of Appeals has sanctioned informal administrative proceedings as valid to support an administrative determination, but it it has not hesitated to enforce other standards where it found that constituional requirements of due process so dictated. *Hecht* v. *Monaghan,* 307 N. Y. 461, 470, 121 N. E. 2d 421 (1954); *Wignall* v. *Fletcher,* 303 N. Y. 435, 440, 103 N. E. 2d 728 (1952); *Stuart* v. *Palmer,* 74 N. Y. 183, 190-191, 30 A. R. 289 (1878).

C.

The Second Circuit predicated its decisions in the present cases upon the reasoning and conclusions of this Court in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). The *Goldberg* case and the present cases, however, are quite dissimilar, and the reasoning by analogy of the Court of Appeals in these cases was not warranted. (See *Cohens* v. *Virginia,* 6 Wheat. 264, 399 (1821)). The ruling in *Goldberg* v. *Kelly,* which deals with impecunious welfare recipients whose sole source of subsistence had been terminated by welfare authorities, was brought into the present cases in its entirety without any attempt to differentiate or distinguish the circumstances, and the nature of the governmental action, taken against the Tenants herein. Although the Second Circuit cited the established principle that the nature of the governmental function in-

volved, and the species of private interest which is affected by the governmental action, must be weighed in each particular situation, no effort to weigh or evaluate these decisive factors was in fact made by that court.

In *Goldberg* v. *Kelly*, the crucial factor which impelled the majority of this Court to reach its due process conclusions was the desperate, irremediable plight of a welfare recipient whose financial means to live and survive is summarily withdrawn. This vital, distinctive factor is entirely lacking in the cases involving termination of tenancy, and certainly with respect to the assertion of additional rent charges. The administrative procedures attacked here are only the inception of a long process which takes many months before removal of the tenants from the premises is effected, during which judicial review is available. (See affidavit of Ira S. Robbins, Appendix K, pp. 113a-114a.)

The procedures considered by this Court in *Goldberg* had been only recently adopted. The procedures now before the Court have been in effect for many years and provide for a review procedure, which in cases of Non-Desirability affords an additional opportunity for a personal appearance with counsel and to produce witnesses.

Furthermore, needy eligible persons and families have an absolute right under law to receive public financial assistance. On the other hand, not all eligible and needy applicants for public housing in New York City can be admitted to public housing projects due to the lack of sufficient public housing units. Admission depends upon a schedule of priorities based upon need. (See *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262, 263 (2 Cir. 1968)).

Questions touching upon the serious impact of non-desirable tenant behavior upon other tenants and of conflict between tenants by reason of mandated adversary proceed-

ings for termination of tenancy, were not considered by the Second Circuit. These considerations were not present in the *Goldberg* case, where the impact of deprivation of welfare benefits was solely upon the recipient involved.

It has been stated "The Due Process Clause does not disregard vital differences." *In re Groban*, 352 U. S. 330, 337 (1957), Frankfurter, J., concurring. The foregoing distinctions were neither examined nor considered by the second Circuit when it ruled that the principles set forth in *Goldberg* v. *Kelly* were fully applicable to termination of public housing tenancies and assertion of additional rent charges.

The possible consideration of the foregoing factors by the District Court on remand is precluded by the direction of the Court of Appeals which explicitly singled out "expeditiousness" as the sole consideration to be explored by the District Court (Appx. A, pp. 13a, 25a). Compare *Randell* v. *Newark Housing Authority*, 384 F. 2d 151, 154 (3 Cir. 1967); *Kelly* v. *Wyman*, 294 F. Supp. 893, 905 (S.D.N.Y. 1969), aff'd *sub nom., Goldberg* v. *Kelly*, 397 U. S. 254 (1970), where considerations of confidentiality of information were not altogether rejected.

It is worthy of note that the majority opinion in *Goldberg* v. *Kelly* recognized that "in this developing field of law any procedural requirements beyond those demanded by rudimentary due process" should not be imposed in advance of their necessity. 397 U. S. at 267. In the companion case, *Wheeler* v. *Montgomery*, 397 U. S. 280, 284 (1970), Chief Justice Burger in dissent, stated that courts should "wait until more is known about the problems before fashioning solutions in the rigidity of a constitutional holding." The Second Circuit failed to observe these admonitions in reaching its decision in the present cases.

II

In *Thorpe*, *supra*, this Court ruled that it would not make constitutional decisions on matters which had not reached the point where a concrete fact situation was presented for adjudication. The Court stated that it does not sit to ". . . decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . ." (393 U. S. at 283-284).

Plaintiffs *Humphrey* and *Rolle* neither presented factual issues at the TRB hearing, in their Civil Rights Act complaints, nor in the affidavits they submitted on the Authority's motion to dismiss in the District Court. The cases are legion which hold that constitutional adjudication can only be given meaning by being applied to concrete facts in specific cases. See e.g. *Zemel* v. *Rusk*, 381 U. S. 1, 20 (1965); *Golden* v. *Zwickler*, 394 U. S. 103, 110 (1969). If constitutional adjudication depends upon facts, the facts before the Second Circuit did not support a case for finding that there was a denial of procedural due process. The Court of Appeals was therefore compelled to posit premises not relevant to the issues (e.g. improper use of tenant folder, inadequate notice, absence of findings) to reach its conclusion that procedural due process had been denied under the Authority's procedures. Compare the remarks of Mr. Justice Brennan in *Goldberg* v. *Kelly*, *supra*, and Chief Justice Burger in *Wheeler* v. *Montgomery*, *supra*, to the effect that constitutional holdings on questions of procedural due process should not be made in the absence of clear necessity for a court ruling.

In the present cases, the mere availability of the tenant folder to the TRB was cited to support the argument that due process had been denied, but substantive facts derogating from the Authority's basis for termination of tenancy were not adduced at any stage of the proceedings taken below. The factual basis for each termination action,

set forth in the respective affidavits of Ira S. Robbins, Vice-Chairman of the Authority for each case, and not controverted in each of the respective complaints by *Humphrey, Rolle* and *Escalera*, or by affidavit, presented a sufficient administrative basis under New York law for the termination of tenancy action taken by the Authority. *Willcox* v. *Stern*, 18 N. Y. 2d 195, 203, 219 N. E. 2d 401, 273 N.Y.S. 2d 38 (1966). Federal law on this subject is not to the contrary. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 207 (1947); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536 (1946). Accordingly, the Court of Appeals was not justified in dealing with the purported constitutional questions.

The Second Circuit, contrary to the holding in *Thorpe, supra*, and numerous other decisions of this Court, rendered an abstract, hypothetical opinion since the undisputed facts in each case of terminated tenancy rationally supported the Authority's determination. In this posture of the case, the Court of Appeals should have eschewed a Civil Rights Act decision in the cases. Compare *Conway* v. *California Adult Authority*, 396 U. S. 107, 110 (1969), where this Court stated that it would not render an "advisory opinion" on a "purely artificial and hypothetical issue". Accordingly, the prescriptions laid down by the Second Circuit for amplified notice, for cross-examination and findings, for availability of the tenant folder and the TRB Handbook, were extraneous to any constitutional issues presented in these cases and such rulings should therefore be set aside.

In mandating that tenants facing termination of tenancy be afforded cross-examination and confrontation, the Second Circuit ignored the rule of reason laid down by this Court in *Thorpe, supra*, 393 U. S. at 283-284. In the present cases the central fact, i.e., criminal convictions in *Humphrey* and *Rolle* and the presence of a dog in *Escalera*, rationally and adequately support the Authority's adminis-

trative determination. There is no material issue of credibility or of fact in any of these cases, and therefore there is no need for cross-examination. (Compare the judgment of the District Court in *Kelly* v. *Wyman*, 294 F. Supp. 893 (1969), aff'd *sub nom. Goldberg* v. *Kelly, supra*, Appendix C, p. 39a.)

The opinion of the Second Circuit made no concession to the possible variations in the circumstances of particular tenants where complaints of non-desirable activity or conduct were involved. Questions of cross-examination should be reserved for the appropriate factual situations. (See Authority Resolution, Appendix F, p. 58a, authorizing the Chairman of TRB to subpoena and swear witnesses.)

In addition, Mrs. Rolle refused to participate unless the conditions she laid down for conducting what she considered to be a constitutionally valid administrative proceeding by the TRB were met. This refusal to participate in an administrative proceeding where the tenant would be afforded an opportunity to state why the two convictions of the Rolle son should not be a basis for termination of tenancy precluded any favorable disposition in her case. (See *McKart* v. *United States*, 395 U. S. 185, 194-195 (1969); *SEC* v. *R. A. Holman & Co.*, 323 F. 2d 284, 287 (D. C. Cir. (1963)).

III

In holding that the availability of judicial review in the New York State Supreme Court in Article 78 proceedings does not satisfy the due process requirements of the Fourteenth Amendment, and that consequently, an adversary-type proceeding on the administrative level is required in terminating public housing tenancies, the decision below departs from established law. The New York Civil Practice Law and Rules (CPLR) require that when a pro-

ceeding is brought to challenge an administrative determination, the administrative body or officer is required to serve "... a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of." N. Y. CPLR 7804 (d). See also *Vinson* v. *Greenburgh Housing Authority*, 29 A. D. 2d 338, 339, 288 N.Y.S. 2d 159 (2d Dept. 1968), appeal argued May 28, 1970, N. Y. Court of Appeals.

New York case law requires that there be "factual support" for an administrative determination to be valid. *Farina* v. *State Liquor Authority*, 20 N. Y. 2d 484, 493, 231 N. E. 2d 748, 285 N.Y.S. 2d 44 (1967); *Sled Hill Cafe* v. *Hostetter*, 22 N. Y. 2d 607, 613, 241 N. E. 2d 714, 294 N.Y.S. 2d 497 (1968). Substantially similar provisions have been in effect in New York for over a century and have afforded full and fair review for many thousands of litigants who have challenged the action of an administrative body or officer. N. Y. CPLR 7803 (3) affords judicial review to aggrieved persons who claim that "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion * * *".

In *Murray* v. *Murphy*, 24 N. Y. 2d 150, 157, 247 N. E. 2d 143, 299 N.Y.S. 2d 175 (1969), the dismissal of a police officer on grounds not charged against him was held to be in violation of due process. Under law established by this Court, the availability of such state judicial review has been deemed sufficient to meet the constitutional requirements of procedural due process, irrespective of whether faulty procedures were followed at the administrative level. *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268, 284 (1969); *Toomer* v. *Witsell*, 334 U. S. 385, 392 (1948); *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189-190 (1937). However, the Second Circuit in the cases now before this Court ruled that claimed deficiencies in the Authority's administrative procedures could not be cured by the availability of judicial review in Article 78 proceedings in the New York

State Supreme Court. Although several district court decisions in the Second Circuit have held that Article 78 proceedings provide a satisfactory and sufficient mode of judicial review of administrative action, *Gold* v. *Lomenzo*, ~~cisions in the Second Circuit have held that Article 78 pro-~~ 304 F. Supp. 3, 9 (S.D.N.Y. 1969); *Muhammad Ali* v. *Division of State Athletic Comm. of New York*, 308 F. Supp. 11, 15 (S.D.N.Y. 1969); *Brockway* v. *Tofany*, 310 F. Supp. 266, 267 (S.D.N.Y. 1970), the court implicitly discredits the usefulness of such judicial review.

IV.

In respect to the putative claims asserted by *Lockman*, *Humphrey*, *Haywood* and *Escalera* regarding additional rent charges, the Second Circuit ruled that an adversary-type of hearing must be conducted by the Authority before such a rent charge can be asserted, notwithstanding that the Authority can establish its right to collect such charge, when contested by the tenant, only after a full-scale trial in the Civil Court in which the tenant can put in issue the legal validity of the charge, the factual basis upon which it is asserted, the amount of damages claimed, or any other defense.*

The additional rent charge is authorized by the lease agreement between the parties. The additional rent does not become a legally enforceable obligation against the tenant until there is a full, *de novo* trial in the Civil Court of the City of New York. The court has jurisdiction to decide against the Authority on the merits, and has done so. (See N. Y. Real Property Actions and Proceedings Law, § 743, Appendix M, p. 127a.)

* Note that this position of the court is directly at odds with its position in cases of termination of tenancy (*Escalera*, *Humphrey* and *Rolle*), that it was the unavailability of a full scale judicial trial upon all the issues that made an adversary-type administrative hearing essential.

The availability of a complete trial in the lowest echelon of the New York City court system necessarily negates the holding that an adversary-type hearing is required before the Authority may assert an additional rent charge. *Lichter* v. *United States*, 334 U. S. 742, 791-792 (1948); *Toomer* v. *Witsell*, 334 U. S. 385, 392 (1948). Moreover, the procedure followed by the project manager constitutes an investigative, pre-litigation process (See Appendix H, pp. 97a-99a) designed to help the Authority determine whether it will assert an additional rent charge, and therefore due process requirements are inapplicable. *Hannah* v. *Larche*, 363 U. S. 420, 441-442 (1960); *In re Groban*, 352 U. S. 330, 332 (1957).

The consequence of the decision is that before the Authority may even undertake to secure a judgment against the Humphreys for the toilet stoppage work it performed, it must conduct an adversary-type hearing to determine whether it should seek to recover the $3 charge in the Civil Court. Compare *Priebe & Sons* v. *United States*, 332 U. S. 407, 411-413 (1947). The Second Circuit advanced no sound, legal reason why two adversary-type proceedings must be pursued by the Authority in such instances. *Goldberg* v. *Kelly* on this specific point is to the contrary. 397 U. S. at 267, n. 14. At best the interests of the tenants are in the nature of property rights (*Phillips* v. *Comm.*, 283 U. S. 589, 596-601 (1931). There is no civil liberties issue such as freedom of speech, association, or religion, and the tenant has no right to invoke the jurisdiction of the federal court under 42 U.S.C. §1983. (See *Eisen* v. *Eastman*, 421 F. 2d 560 (2 Cir. 1969.)

V

The Second Circuit rejected the principle of abstention in the present cases. To the contrary such principle was recommended by the Court of Appeals for the Third Cir-

cuit in *Randell* v. *Newark Housing Authority*, 384 F. 2d 151, 157, n. 15 (1967), cert. denied, *sub nom. Avent* v. *Newark Housing Authority*, 393 U. S. 870 (1968), which involved termination of several tenancies for undesirability.

This Court, in ordering the application of abstention in *Reetz* v. *Bozanich*, 397 U. S. 82, 85 (1970), quoting from another case, recognized that: "'. . . state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court.'" The record in the present cases shows that a complex scheme with detailed procedures for termination of tenancies has been established by the Authority in accordance with power granted under section 37(1)(w) of the New York Public Housing Law (McKinney Consolidated Laws, Book 44A). The courts of New York State should have the initial opportunity to appraise the validity of claims of violation of procedural due process in this developing field of law.

As the Third Circuit stated in *Randell*, *supra*, at page 157 n. 15, "the circumstances of this controversy make it particularly appropriate for state courts to act as the initial forum, both because of the federal legislative pattern itself gives primary responsibility to the states for establishment and administration of any low-rent housing project, 42 U.S.C. § 1401, and because the particular problems of administering low-rent housing evictions are closely tied to various landlord and tenant actions before the courts of the State of New Jersey." In the *Randell* case, on remand, the District Court applied the principle of abstention.

The courts of New York State have dealt with such problems before where public housing tenants have invoked the requirements of the First and Fourteenth Amendments. *Peters* v. *New York City Housing Authority*, 1 A. D. 2d 694, 147 N.Y.S. 2d 859 (2d. Dept. 1955);

Vinson v. *Greenburgh Housing Authority*, 29 A. D. 2d 338, 340-341, 288 N.Y.S. 2d 159 (2d Dept. 1968), appeal pending, N. Y. Court of Appeals; *Manigo* v. *New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S. 2d 1003 (1966), aff'd. 27 A. D. 2d 803, 279 N.Y.S. 2d 1014 (1967), lv. app. den. 19 N. Y. 2d 583, cert. denied, 389 U. S. 1008; *In re Williams* (*White Plains Housing Authority*), 62 Misc. 2d 613, 309 N.Y.S. 2d 454 (Sup. Ct. West. Cty. 1970).

In *Harrison* v. *NAACP*, 360 U. S. 167, (1959), a Civil Rights Act suit, abstention was sanctioned by this Court to allow the Virginia courts to rule in the first instance on the constitutional issues.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

June, 1970.

Respectfully submitted,

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Attorney for Petitioners.

HAROLD WEINTRAUB,
Of Counsel.

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 343

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
Petitioners,
against
PEDRO ESCALERA and ROSE ESCALERA,
Respondents.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
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against
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NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
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against
CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CRCUIT

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IN THE

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CRCUIT

Opinion Below

Since petitioner's brief was served, the opinion of the Court of Appeals in these cases has been reported at 425 F.

2d 852 (1970). In addition, the judgment of the Appellate Division, Second Department, in *Vinson* v. *Greenburgh Housing Authority*, 29 A D 2d 338 (1968), was affirmed without opinion by the Court of Appeals of New York on July 1, 1970 (N.Y.L.J., July 6, 1970, p. 2, col. 2).

ARGUMENT

A. These Cases Are Ripe For Review By This Court.

The action of the Court of Appeals is ripe for review by this Court because (1) categorical holdings in respect to significant procedural due process requirements pertaining to public housing authorities were rendered without significant qualification and (2) there are no genuine issues of material fact bearing on the constitutional questions raised by respondents. Despite contentions by respondents that the Second Circuit decision was made at the "pleadings" stage (Escalera-Rolle Brief, p. 6; Lockman-Humphrey Brief, p. 5), and that it is therefore not ripe for consideration by this Court, the Second Circuit ruled, in categorical terms, that:

> "First, summary notice such as that sent to the tenants here of the non-desirable conduct under consideration by the TRB is inadequate." (Appx. A to Pet., p. 14a; 425 F. 2d 853, at 862);
>
> "Second, denying tenants access to the material in their folders, when the entire folder is considered by the TRB in its determination of eligibility, deprives the tenants of due process." (Appx. A to Pet., p. 15a, 245 F. 2d at 862);
>
> "Third, denying the tenant the opportunity to confront and cross-examine persons who supplied information in the tenant's folder upon which HA action is grounded is improper." (*Id.*)
>
> "Finally, we find that the HA's failure to disclose the rules and regulations in the TRB Handbook govern-

ing the TRB panel at the hearing concerning termination for non-desirability may be found to be improper." (Appx. to Pet., p. 16a; 425 F. 2d at 863).

Although the last portion of the Court of Appeals holding does admit to some qualification as to the ultimate finding to be made by the District Court upon the trial of the actions, it is but a tangential issue (because the standards for determining non-desirable conduct are set forth in the Authority letter to the tenant setting the matter down for a hearing, see Appx. A, p. 6a; 425 F. 2d at 858), and serves only to underline the "law of the case" finality of the Court's holdings in respect to the other three matters on which it rendered judgment. The Court also ruled that the Authority's "procedures for terminating tenancies on the ground of violation of rules and regulations and for assessing additional rent charges" are constitutionally deficient in respect to the first three quoted matters (*Id.*).

Accordingly, something more than a bare remand to the District Court to consider and determine the issues between the parties under the Civil Rights Act was effected by the Second Circuit decision (Compare *Holloway* v. *Department of Housing and Urban Development*, 418 F. 2d 242, 5 Cir. 1969; *Nader* v. *General Motors Corp.*, 25 N. Y. 2d 560, 571, 307 N.Y.S. 2d 647, 656, 255 N. E. 2d 765, 1970, Breitel, J. concurring).

In reaching its decision, the Second Circuit had the Authority's printed procedures before it, supplemented by affidavits as to Authority practices executed by the Vice-Chairman of the Authority, Ira S. Robbins, Esq., and the Court relied on these and other materials, outside of the pleadings, in formulating its holdings (See 425 F. 2d at 857 n. 1; p. 858 n. 4; p. 860 n. 5; p. 863 n. 7;

by *Humphrey and Rolle* (where undisputed criminal convictions were the baiss of the Authority's termination of tenancy action), or by *Escalera* (where the complaint admitted that the dog had been harbored for years in the project apartment). The Second Circuit explicitly confined itself to review of "the constitutionality of the procedures by the HA" (Appx. A, 19a; 425 F. 2d at 864; see also Appx. A, p. 14a; 425 F. 2d at 861-862), showing that the relevance between the particular facts in each of the termination of tenancy cases was not examined or relied upon as the basis to premise the foregoing constitutional deprivations of procedural due process. As was said by the Court of Appeals for the District of Columbia: "A hearing is required only in so far as it is required to resolve contested issues of fact that will affect the outcome of the proceeding." *Hunt Oil Co. v. FPC*, 424 F. 2d, 982, 987 (D.C.C. 1970). The same court has ruled: ". . . a hearing is not required where no such issues exist. Neither the statute nor the constitutional imperative of due process requires such an exercise in futility." *Amalgamated Clothing Workers of America v. NLRB*, 424 F. 2d 818, 829-830 (D.C.C. 1970).

Consequently, in view of the adequate, rational basis for the Authority's administrative determination on the facts in each case, the Second Circuit was foreclosed from entry into the domain of constitutional adjudication.

These cases, however, are ripe now for review by this Court because those procedures which have been brought into question and the recitals in respondents' complaints as to what transpired in each particular case, provide this Court with a full and adequate picture of the Authority's termination of tenancy procedures (which are filed in the office of the New York Secretary of State and the New York Commissioner of Housing and Community Renewal, New York Public Housing Law, section 54, McKinney's Laws, 1955, Book 44A) and its regulations dealing with

additional rent charges to enable it to make an informed decision on any valid constitutional questions presented by the complaints. The assertions in the Escalera-Rolle Brief as to alleged "factual disputes" (p. 5) is without serious constitutional import in respect to the questions to be decided because the TRB Handbook, as the name implies, is for internal use only and does not add to or detract from the nondesirability standards established by the Authority and furnished to the tenant.

Counsel for respondents, Escalera-Rolle, suggest that the Court may avoid unnecessary constitutional adjudication in these cases by denying certiorari because there is some indication that the Department of Housing and Urban Development (HUD) has given consideration to the issuance of new regulations and recommendations dealing with tenants' leases and grievance procedures (Escalera-Rolle Brief, p. 7). In the footnote to their discussion of this matter, counsel for these respondents candidly admit that: "... there is no guarantee that they will in fact be issued," and the letter from an official of HUD directed to counsel for these respondents, annexed to the Supplemental Memorandum of Escalera-Rolle, shows that nothing concrete or tangible has been agreed upon. Nor is there any indication of the scope and extent of the possible regulations, which may or may not be issued in the form of recommendations to local public housing authorities, which would impinge upon the particular issues now before the Court.

It is notable that the proposed recommendations and regulations would be applicable to federally-aided projects only; half of this Authority's projects are not federally-aided (see *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262, 263, 2 Cir. 1968.* Respondent Escalera resides in Wald Houses, a state-aided project and Rolle resides in Riis Houses, a city-aided project, both of which are without the jurisdiction of HUD.

Counsel for these respondents have also sought to invoke the dissent of the justices in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), which suggested that the majority in that case should stay their opinion because federal regulations dealing with the subject matter of the litigation were to become effective July 1, 1970. Of course, that argument is less than persuasive because it was not followed in that case, but more to the point, in *Goldberg* v. *Kelly* there were specific, concrete regulations which were scheduled to go into effect on July 1, 1970. Nothing of that kind exists in respect to the present cases.

B. Availability Of Article 78 Judicial Review In The New York State Supreme Court Obviates The Constitutional Questions Raised In These Cases.

Respondents contend, and the Second Circuit concurred, that the "burdens" of seeking article 78 review in the New York State Supreme Court overcome any benefits to be derived from such judicial review. (Appx. A, p. 22a, 425 F. 2d at 866; Escalera-Rolle Brief, p. 9 fn.; Lockman-Humphrey Brief, p. 7 fn.). However, respondents, Lockman-Humphrey (Brief, p. 7 fn.) concede that article 78 proceedings provide judicial review as to whether this Authority made a determination that was "arbitrary, capricious or an abuse of discretion", and the Second Circuit noted that the Authority would, in any event, be compelled in an article 78 proceeding to reveal the

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* Contrary to the statement in the Lockman-Humphrey Brief (p. 8), the *Holmes* decision, based upon a motion to dismiss the complaint, found that the Authority's admission procedures for state-aided projects were deficient, since they were not set forth, although the admission procedures for federally-aided projects were found to have a valid objective scoring system to determine priority for admission to these housing projects (398 F. 2d at 264-265). The Authority's answer in that action denies the allegations of the complaint and shows that a uniform, objective system of admission procedures is followed for applicants for all projects.

ground for its termination of tenancy action (Appx. A, p. 22a, fn. 9, 425 F. 2d at 866 n. 9). In such a review proceeding, it is established law in New York that an administrative body which does not conduct a formal trial hearing must show that it acted upon "proper data and evidence" (*Meschino* v. *Lowery*, 34 A D. 2d 255, 258, 310 N.Y.S. 2d 908, 911, App. Div. 1st Dept, 1970). In addition, the recent successes of plaintiff public housing tenants in *Vinson*, *supra*, and in *Williams* v. *White Plains Housing Authority*, 62 Misc. 2d 613, 309 N.Y.S. 2d 454, 1970, attest to the efficacy of the article 78 remedy to rectify complaints of procedural due process in public housing termination of tenancy cases.* The Second Circuit itself cites the *Williams* and *Vinson* decisions in support of its holdings at several places.

In *Stewart*, *infra*, where it was also argued that to require a tenant to seek judicial review to complain against the procedures followed by the Chicago Housing Authority placed an undue burden upon the tenant (Stewart Brief to the U. S. Supreme Court, p. 9), this Court refused to grant certiorari. It has never been ruled, as the Second Circuit ruled in the instant cases, that the "burden" of seeking judicial review of a state administrative determination is so disabling and burdensome as to constitute a constitutional infirmity under the due process requirements of the Fourteenth Amendment (Compare *Lee* v. *Habib*, 424 F. 2d 891, 901, D.C.C. 1970). This Court's holdings are to the contrary (*Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 284 (1969); *Toomer* v. *Witsell*, 334 U. S. 385, 392, 1948; *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189-190, 1937), and the Second Circuit holding overturns established law in this respect. Cf. *Goldberg* v. *Kelly*, *supra*, 397 U. S. at 260.

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*See also *Sanders* v. *Cruise*, 10 Misc. 2d 533, 173 N.Y.S. 2d 871 (1958); *Johnson* v. *New Rochelle Housing Authority*, 44 Misc. 2d 138, 253 N.Y.S. 2d 39 (1964).

C. The Randell And Stewart Cases Are Irreconcilable With The Holding Of The Second Circuit And Therefore This Court Should Examine The Validity Of The Escalera Judgment In Light Of Those Holdings.

1. *Randell* v. *Newark Housing Authority*, 384 F. 2d 151 (3 Cir., 1967), cert. denied *sub nom. Arent* v. *Newark Housing Authority*, 393 U. S. 870 (1968).

The Escalera-Rolle Brief (pp. 11-12), in discussing the *Randell* case, *supra*, fails to come to grips with what were the major issues presented in that case and the disposition made of those issues. First, the tenants there complained against the use of "secret files" in effecting termination of tenancy (Randell Brief to U. S. Supreme Court, p. 6). It was further claimed that a Newark Housing Authority tenant is evicted without affording him a full trial on the merits in the state court in the eviction proceeding (*Id.*, pp. 7 and 14), which parallels the practice which obtains in eviction proceedings brought by this Authority in the New York City Civil Court. (It is to be noted that in discussing the availability of review to a tenant in a New Jersey eviction proceeding, the Escalera-Rolle Brief, p. 12, inaccurately characterizes these state eviction proceedings as offering a tenant a "'judicial hearing on any claimed denial of due process in his eviction'", quoting from the Randell opinion by the Third Circuit. However, as noted above, the Randell plaintiffs in their brief to this Court had claimed otherwise.) Finally, the fact that the Newark Housing Authority failed to accord to the complaining tenants an administrative hearing (Randell Brief to U. S. Supreme Court, pp. 1-2), is entirely glossed over by these respondents. Despite this catalogue of contentions in Randell of unconstitutionality, this Court refused to grant certiorari.

The Lockman-Humphrey respondents (Brief, p. 9) concede that the Randell case raises "somewhat comparable

basic issues" and that the Third Circuit suggested abstention which was ultimately effected by the District Court. Abstention should likewise be considered in the disposition to be made in this petition for certiorari because the solution to the intricate problems connected with many of the questions raised in these cases have been entirely removed from consideration by state authorities and state courts as a result of the Second Circuit judgment. Compare *Zwickler* v. *Koota*, 389 U. S. 241, 249 n. 11 (1967).

2. *Chicago Housing Authority* v. *Stewart*, 43 Ill. 2d 96, 251 N. E. 2d 185 (1969), *cert. denied*, 397 U. S. 1000 (1970).

Respondents, Escalera-Rolle, ignore the *Stewart* decision altogether. Respondents, Lockman-Humphrey, inaccurately describe the basis for termination of tenancy in Stewart as "non-payment of rent" (Brief, p. 10). Actually, the basis was repeated delinquency in the payment of monthly rent. These respondents overlook the contentions made to this Court by Stewart that (as contended in *Randell* and by all of these respondents in their complaints) the public housing tenant in Chicago has no opportunity in state court eviction proceedings to litigate "the causes for eviction" (Stewart Brief to U. S. Supreme Court, p. 6), which was claimed to be a deprivation of procedural due process. Finally, the Lockman-Humphrey respondents ignore the fact that Stewart complained that he was deprived of a fair administrative hearing or a court procedure to enable him to present his defense to the proposed termination of his tenancy and eviction (*Id.* pp. 9-10).

The holdings of the Third Circuit in *Randell* and of the Illinois Supreme Court in *Stewart*, where this Court denied certiorari to the petitioning tenants in both instances, are in direct conflict with the holding made by the Second Circuit in these cases on the foregoing issues. The holding of the Second Circuit is also in conflict with a hold-

ing of the Mississippi Supreme Court in a public housing termination of tenancy case which has been docketed for possible review in this Court, *Hooker* v. *Brookhaven Housing Authority*, U. S. Supreme Court, Docket No. 2358 Misc., and another by the Fourth Circuit, decided on July 31, 1970, *Johnson* v. *Tamsberg, Executive Director, Housing Authority of Charleston*, No. 13, 941.

D. There Is An Urgent Need For Review Of The Second Circuit Decision Which Affects Widespread Administrative Activities Of Public Housing Authorities.

The manner in which the issues have been decided in these cases will seriously affect the efficient and proper functioning of the national program to provide public housing. In addition, the Second Circuit decision impairs the specific, declared objectives enunciated by Congress for the more efficient operation of low-rent public housing projects (See Appx. A, p. 123a). The Second Circuit decision, dealing with several questions expressly left open by this Court in *Thorpe*, *supra* (393 U. S. at 283-284), over-judicializes the administrative activities of public housing authorities in terminating tenancies and for recovery of additional rent charges for damage to property and breach of regulations. These are cases of first impression, testing the reach and extent of the Civil Rights Act and the application to public housing authority operations of concepts of procedural due process under the Fourteenth Amendment; they should command consideration by this Court at this time because of their nationwide importance and impact.

Although the concluding portion of the Second Circuit decision (Appx. A, 24a-25a; 425 F. 2d at 867) is expressed in precatory terms, the categorical and unqualified nature of the earlier pronouncements have created serious problems for public housing authorities regarding the invalidity of the notice served on tenants (where the Second

Circuit confuses the difference between an adequate notice in the context of these administrative procedures and the evidence later adduced in support of the charges in the notice, compare *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 224-225, 1938); because public housing authorities are mandated to allow cross-examination in all cases irrespective of the relevancy or necessity in a particular case (Compare *FCC* v. *WJR*, 337 U. S. 265, 274-275, 1949; *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205, 1956); requiring tenants' folders to be made available in all instances in termination of tenancy and additional rent charges in total disregard of long-established rules providing for appropriate discovery both in federal and state jurisdictions (See *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176, 1184, 2 Cir. 1970), and despite the fact that use of a folder constitutes no more and is no worse than the reception of hearsay evidence at an administrative hearing, because the Authority's determination must ultimately rest upon "proper data and evidence", *Meschino*, *supra*, i.e., a rational basis, which on undisputed facts exists in each of the termination of tenancy cases herein (see *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 246-248, 1964; *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U. S. at 230; compare *Bruton* v. *United States*, 391 U. S. 123, 135, 1968.

Fourth, the Second Circuit directed that the Authority must afford an adversary proceeding at the administrative level with all of the foregoing incidents of such proceedings despite the fact that the tenant may either concede the validity of the Authority action (see *Thorpe*, *supra*, 393 U. S. at 284), and when the aggrieved tenant still retains the right in all instances to pursue state judicial remedies irrespective of the outcome at the administrative level (*Thorpe*, *supra*, *id.*). These unprecedented requirements have tended to sow confusion and doubt in the relevant activities of this public housing authority and will, in turn, affect like operations by public housing au-

thorities throughout the land unless a prompt decision is made to resolve these questions. The increased influx of public housing authority cases since *Thorpe*, raising questions left unanswered by that decision, requires a definite answer by this Court at this time.

The law of the case established by the Second Circuit's opinion in respect to the foregoing matters and its holding that a class action on behalf of all public housing tenants has been set forth if other routine prerequisites of Rule 23(a), Fed. R. Civ. P., are established (Appx. A, p. 24a, 425 F. 2d at 867), foreshadows that a temporary injunction most certainly will issue from the District Court to implement the categorical holdings enunciated by the Second Circuit in these four cases in respect to the Authority's procedures (See Appx. A, p. 14a, 425 F. 2d at 861-862), and housing authority activities in the areas under consideration will be brought to a halt until the questions are ultimately resolved by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and such other and further relief should be granted as the Court may deem appropriate and necessary.

September 4, 1970.

Respectfully submitted,

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